



Neutral Citation Number: [2023] EWHC 432 (Ch)

Case No: BL-2018-002369/BL-2021-000680

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (LONDON)
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/02/2023

Before:

MR JUSTICE FREEDMAN

Between:

MUSST HOLDINGS LIMITED

Claimant

- and -

**(1) ASTRA ASSET MANAGEMENT UK
LIMITED**

(2) ASTRA ASSET MANAGEMENT LLP

Defendant

s

Mr P. Knox QC and Ms K. Bailey (instructed by **Taylor Wessing LLP**) appeared on behalf
of the **Musst Parties**

Mr C. Boardman QC and Mr T. Beasley (instructed by **Payne Hicks Beach**) appeared on
behalf of the **Astra Parties**

Hearing dates: 30 and 31 August 2022

Approved Judgment

**This judgment was handed down remotely at 2pm on Tuesday 28 February by
circulation to the parties or their representatives by e-mail and by release to the
National Archives**

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First draft judgment handed down: 31 January 2023

Various written submissions regarding costs and other matters: 13 and 15 February 2023

Second draft judgment handed down: 23 February 2023

MR JUSTICE FREEDMAN :

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II Introduction

1. Towards the end of the judgment handed down on 17 December 2021 (“the Judgment”) which was in respect of what was termed Crown 1, reference was made to a different action which had been commenced on 29 April 2021 in respect of different portfolios in Crown referred to as Crown II and Crown III (“the Second Action”). An application was brought on behalf of the Defendants in the Second Action to strike out the claim on the basis that (a) it was barred by reason of the matters having been litigated in the action in which I gave judgment (“the First Action”) whether in the nature of abuse of process or the other kinds of estoppel and bars to a second action, or (b) it disclosed no reasonable cause of action (CPR 3.4) and/or had no real prospect of success (CPR 24). In this judgment, the term “Musst” will be used to refer to the Musst companies in the heading of the action or any of them and “Astra” will be used to refer to the Astra companies in the heading of the action or any of them.
2. The broadest summary of the genesis of the application and of the issues between the parties in this strike out application was contained in the closing paragraphs of the Judgment, which I shall set out:

“The extent of relief in respect of Crown II and Crown III

667. ...Crown II and Crown III...were set up for different portfolios in Crown. On 30 April 2015, Astra LLP told Musst that what was called Crown II had been set up for a new strategy, "and therefore it is not covered by the existing Introduction Agreement [the Octave Contract] ". The management of this account was subsequently transferred to Astra UK at the time of the transfer of Astra LLP's business to it. On 5 December 2019, Payne Hicks Beach reiterated that the Crown II account followed a different strategy.

668. On disclosure in relation to the Defamation Claim, Astra, on 18 September 2020, disclosed for the first time an internal email (from Mr Adler (of Astra) to Crown) dated 3 February 2016 in which he said, talking of the Crown I and the Crown II accounts and two other entities: "As you know, all our credit vehicles have pursued a very similar if not identical strategy so far; forward ASCIL (another entity) will invest in slightly more liquid credit assets to reflect its changed liquidity profile."

669. Musst say that it was agreed between the parties that any questions in relation to non-payment in relation to Crown II could not be conveniently dealt with in these proceedings (i.e. because of the need for disclosure and expert evidence) but would have to be dealt with in subsequent proceedings, if need be. It is not apparent whether that means in this action or in another action. There was not an express plea as regards non-payment in relation to Crown II and Crown III. An application to amend this action so as to include reference to Crown II and Crown III was withdrawn by consent. There was a holding

claim form issued on 29 April 2021 in which Musst sought to claim for the fees in respect of Crown II and Crown III.

670. In the meantime, Musst submits that an order should be made in these proceedings allowing Musst to inspect the books and records in relation to Crown II and/or Crown III if it otherwise proves its case on liability, without having first to show that Crown II and Crown III consisted of "Eligible Investments" . It relies on para. 105(1) and 105(2) of RAMPOC seeking production of statements "in relation to all payments made to it ... since May 2016 by 2B, Crown and any other entity introduced by the Claimant" and see also paras. 105(3) and 105(4) and 113 (which claims the same relief against Astra LLP if there was no novation to Astra UK). This is said to arise also out of the wide requirements of clause 13, which provides an obligation to keep books and records, and to allow inspection, in relation to "its activities relating to this Agreement, including but not limited to recording any Eligible Investments" . It also relies on the last words of clause 3.1 referring to " additional investments made for the Current Strategy (emphasis added) directly or indirectly by an Investor into a Fund whether before or after the Cut-off Date are also Eligible Investments." It submits that there is an argument that the investments in Crown II and Crown III are additional investments, and that is therefore sufficient to open the door to disclosure relating to Crown II and Crown III.

671. Since this part of the judgment had been prepared in draft, the Court has been provided with the evidence in support of an application to strike out the 2021 action claiming management and performance fees in respect of Crown II and Crown III. It comprised a 40-page witness statement of Lucas Julian Moore dated 29 September 2021. This was forwarded to the Court on 13 October 2021 by solicitors for Musst with relatively short letters summarising its position. It is not necessary or reasonably possible at this stage to consider that in any detail. One feature of the witness statement is that Astra disagree with the submission of Musst that there was agreement that a claim in respect of Crown II and Crown III might be made in a second action. The submission is that Musst could and should have brought any claim relating to Crown II and Crown III, if at all, in this action. It is submitted by Astra that a fuller analysis of the documents between the parties shows that Musst was not misled as to the strategy adopted in respect of Crown II and Crown III, and there is nothing in the suggestion that there was a recent discovery that the position was not as previously represented. It is also submitted on behalf of Astra that the claim in respect of Crown II and Crown III ought to be struck out on a whole variety of grounds, including abuse of process and no reasonable prospect of

success. Astra also say, in any event, that the reference to "other entity" in RAMPOC is not sufficient to open the door to a disclosure in respect of Crown II and Crown III if the claims in respect of those entities are not being dealt with in this action.

672. This recent development has the effect that it is premature at this stage for the Court to make findings as to whether there ought to be disclosure in this action about Crown II and Crown III. The different understandings of the parties regarding the consequences of the abandonment of the amendment application in respect of Crown II and Crown III require further consideration. Musst may wish to consider which way to turn in respect of any claim in respect of Crown II and Crown III, and in that context, Astra will wish to submit that whichever way Musst turns, it will be to no avail.

673. In these circumstances, this judgment will not, at this stage, make any determination relating to how any claim in respect of Crown II and Crown III will be dealt with or about how disclosure might take part in respect of the same. It is premature in the face of the matters considered above, not least the voluminous evidence in support of the strike out application, for this Court to make any determination at this stage. Further consideration of these matters will be a part of the consequential matters to be considered."

3. This judgment rules on the strike out/summary judgment application. It also decides a closely related issue referred to as the inspection issue about disclosure in respect of Crown II and Crown III. There are some outstanding costs issues in particular in respect of the costs of the consequential hearings of 17 December 2021 and 21 January 2022 (which led to the judgment of 18 March 2022) on which this judgment rules.

II Background

4. It is necessary to set out in some detail the genesis of the dispute in respect of Crown II and Crown III. This is necessary because of the controversy relating to how the issues in respect of Crown II and Crown III were not before the Court in the First Action. This may inform at least to some extent in respect of the abuse of process and related issues.
5. The subject matter of the First Action was about what was called Crown I. There were issues as to what agreement was made in respect of Crown I, about whether introductions were made in respect of two clients (2B and Crown), and as to whether such agreements were novated from Octave to Astra LLP and then to Astra UK. The

Crown II account was established in December 2014. The Crown III account was established by Astra LLP in February 2016.

6. There were some communications in respect of Crown II between Mr Holdom on behalf of Astra and Ms Galligan. In February 2015, Mr Holdom referred to a sum of US\$3,569.06 received in relation to Crown II in addition to sums received in respect of Crown I of a sum of US\$160,256. Ms Galligan responded by asking what the difference was between Crown I and Crown II. There was no direct response to this, and an arrangement was made as to what should be invoiced by the Claimant to Astra LLP. The ratio of the Crown II to the Crown I amount was so small that the question of Ms Galligan was not addressed or pursued at that stage.
7. On 27 April 2015, Mr Holdom sent to Musst Astra LLP's two invoices for the next quarter to Crown, in relation to the Crown I and Crown II accounts, so that the Claimant could work out its entitlement from Astra LLP for that quarter.
8. On 30 April 2015, Mr Holdom told Musst that the invoice sent to the Claimant for the first quarter of 2015 in respect of Crown II for US\$39,772.95 was sent in error and that *'the Crown 2 account was set up for a new strategy (primarily CLO and CRE) and therefore is not covered by the Introduction Agreement as it does not "substantially replicate the investment securities and risk profile of ASSCF"'*. There was a telephone call between Mr Holdom and Ms Galligan in which he repeated that Crown II was a *"new strategy"* created to facilitate Crown's investments into a real estate fund, and Crown III would soon be launched with another new strategy.
9. In the claim form issued in the Contract Claim, there was no separate reference to Crown II and Crown III. The claim in paras. 105 and 107 to 108 includes a claim for the production of books and records in relation to all investments made by Crown. Musst says this must be read as a reference to any investments made by Crown (whether Crown I, II or III), but Astra says that this is only about Crown I in that it takes its meaning in a context in which the claim had not been by reference to Crown II or Crown III. Musst says that the list of issues extends to all Crown accounts, whereas Astra says that they can be read as being all about Crown I alone. There is no reference to all Crown accounts in a way that may be understood to refer to Crown II or Crown III. On 18 April 2019, Deputy Master Bartlett distinguished between Crown and other investors, as to which the Deputy Master said that *"... in my view, you can't ask for a general roving inquiry on disclosure as to other contracts when you have no basis for pleading any case in relation to them... The other way of looking at it is to look at it in respect of the contract You can't get it under the contract before you've established your position on liability and that, in fact, the defendants are bound by the contract at all. To some extent, this is a matter of timing, but I think it's also a question of principle."*
10. The Deputy Master also said the following:

"I just put down, I think, this marker that, if at the end of the day the claimants succeed at trial, they then get their order for an account and one finds there are other introductions on which they are entitled to payment, or indeed there may then be

separate issues in relation to these parties as to whether they are within the contract or not. That may well have implications as to costs and, if additional costs are then incurred because the defendants have done what, at this stage, I have decided they are entitled to do, namely, not to give disclosure of those matters, they may have an unpleasant consequences as to costs from their point of view. But that's all a long way down the line, and may not occur. So that's my decision on that."

11. On 25 October 2019, Astra's disclosure certificate mentioned Crown I. On 14 November 2019, Musst asked Astra to confirm the basis on which they had excluded Crown entities other than Crown I from disclosure to which Astra responded to the effect that such accounts "*fall outside the scope of [Astra's] disclosure obligations*". On 3 December 2019, Musst stated that the disclosure issues were not limited to Crown I and that there had not been disclosed the trading advisory agreement of 28 November 2014 relating to Crown II. Disclosure was sought in respect of all Crown accounts.
12. The response of 5 December 2019 was that the Particulars of Claim had only referred to Crown I: it was stated that "*Crown made additional investments with Octave that could never have been "Eligible Investments" because they were in managed accounts that were not for the "Current Strategy"*". Reference was made to para. 129A of the draft Reply to the effect that Mr Holdom had stated in an email on 30 April 2015 to Musst that the Crown II investment was set up for a new strategy "*and therefore is not covered by the existing Introduction Agreement*". This had not been challenged. Permission would be required to extend the Particulars of Claim, and only if permission was granted, could further disclosure be sought. Permission would be challenged because the managed account was set up for a new strategy (primarily Collateral Loan Obligations and Commercial Real Estate) such that it was not "*designed to substantially replicate the investment securities and risk profile of ASSCF*" and contributions into it were not made "*for the Current Strategy*" with the result that investments into that account could on no basis constitute Eligible Investments for the purposes of the Octave Contract.
13. On 2 March 2020, the Claimant served amended Particulars of Claim for which permission was given, but not referring to Crown II. On 20/21 April 2020, an order was made for expert evidence, only in relation to Crown I, no disclosure having been given in respect of Crown II. However, it was subject to liberty to apply to revise the expert evidence order. On 30 April 2020, Musst asked Astra to confirm that they no longer disputed that they must provide disclosure in respect of all of the Crown accounts. This was not addressed, and the disclosure provided was in respect of Crown I, but not in respect of Crown II and Crown III.
14. On 18 September 2020, there was produced for the first time the email of Dr Adler responding to Mr Plotke of LGT. It was produced for the defamation claim. The parts in bold were the responses of Dr Adler to Mr Plotke's questions.

""Hi Christian

Thank you very much for your time yesterday. The call was very insightful.

I guess, that we have not yet heard back from you that you could not yet agree on a price with a seller.

On a different matter. As we are launching a new account with you, I have to write another research report on Astra. Therefore I will need some updated facts and figures on the company:

- Can you pls send me an overview list of the various products you manage (including AuM, what kind of product, etc)

Total AuM is appr. \$500mm, out of which \$90mm are in a 'non-core' mandate with DB where we manage certain market exposures of their Sharia compliant platform (I believe we have spoken about this when we launched AAM 2). The remainder is held across four vehicles, namely Crown/AAM, Crown /AAM2, 2B LLC and Astra Structured Credit Investments Limited ('ASCIL')(with the restructuring into a more liquid vehicle we have merged Astra Special Situations Credit Fund Ltd and ASCIL for efficiency reasons; Astra Special Situations Credit Fund Ltd retains some cash until its de-regulation is completed, but all assets have been transferred to ASCIL as of 31st December). As you know, all our credit vehicles have pursued a very similar if not identical strategy so far; going forward, ASCIL will invest in slightly more liquid credit assets to reflect its changed liquidity profile (1y soft lock /quarterly redemptions). (underlining added)

- I will need to know the terms of the various products

The terms of interest are probably the fees and liquidity; Crown/AAM and Crown/AAM2 terms are familiar, I guess; 2B LLC is still locked up and has a 2%/20% fee structure. The restructured ASCIL is the only vehicle where things have changed: as mentioned in the previous answer, the liquidity is now quarterly with a one year soft lock (i.e. funds can be withdrawn within the first 12 months, but a redemption fee is payable in this case). The management fee is 2% p.a. for subscriptions less than \$20mm and 1.5% p.a. otherwise. In addition, we are entitled to a performance fee: there is no annual hurdle, but a lifetime hurdle of 5%, i.e. no performance fee is payable unless the NAV has crept up to at least 105% of the NAV on day one. Provided we clear that hurdle, we get 15%

performance fee for a performance up to 10% during the calculation period (read: year) and 20% for a performance above 10%, with catch-up. I have attached the prospectus where all of this is described over many pages in fun-to-read legalese.

- Would you have fact sheets for your two liquid funds?

Please see attached. As mentioned, there is really only one liquid fund.

- How many people are today working for Astra?

10 people currently; however, a junior lawyer will start in March and we are also looking to add one FTE in IT in Q2.

- How much own money is today invested in your products?

All of us have rolled our original investments in Astra Special Situations Credit Fund Ltd into ASCIL; we resp. the LLP have bought shares in Astra Special Situations Credit Fund Ltd in the secondary market last year which have also been rolled into ASCIL. In addition, performance fees have been crystallised for the two Astra funds upon merger; once these fees have been monetised, some \$6mm of our own money will be invested in ASCIL.

- Do you have an updated questionnaire which you could send me? Please see attached.

- Do you have updated marketing material on the firm?

We do not, but if you let me know what you need we can put something together.

If you could send me the information in the next couple of days, would be highly appreciated. I might need more over the time, but I try to keep my report as lean as possible, given that we know Astra now for some time.

....”

15. The next events are of such importance that it is worth setting out in extenso the relevant parts of the chronology of Musst which make lengthy citation of correspondence between the parties on 6, 13 and 16 October 2020. They read as follows (omitting the document bundle references):

(a) 6.10.20

PHB/CB [referring to Payne Hicks Beach/Collyer Bristow, the then respective solicitors], complaining about further application for disclosure, but setting out proposals for resolving the application without a hearing.

- (1) Offers to disclose position appraisal reports and portfolio transaction reports from 2016 to 21.4.20 to the Confidentiality Club.
- (2) But only for Crown I and 2B, and not other managed accounts. This is because such disclosure is not required by the specific disclosure order; it “cannot be required for the purpose of the Expert Evidence Order dated 21 & 22 April 2020 as Chief Master Marsh specifically limited its scope to [Crown I and 2B]”; and it does not fall within general disclosure duties.

(b) 13.10.20

- (1) Eighth witness statement of Lucas Moore, in response to C’s [Musst’s] further application for disclosure. Accepts that the wording of the Specific Disclosure Order in principle extended to “the managed accounts of (i) 2B and (ii) Crown” (i.e. it was not restricted to the 2B Contract and Crown Contract). However, as set out in our clients’ Disclosure Certificate dated 14 May 2020, no documents recovered by our clients’ searches were disclosable by reference to the categories set out.
- (2) (Musst) proposals to avoid the need for a contested hearing on 23.10.20. On reports for managed accounts other than Crown I, it offers:

“With reference to Paragraph 1 Reports for other Managed Accounts (as defined in the March Order), as a reluctant compromise on our client’s part, your clients agree to disclose those documents (as required pursuant to the March Order) within 21 days of Judgment following trial in these proceedings, together with any other relevant documents relating to Crown 2 and Crown 3 and other investors, but only in the event that the Court finds that our client is entitled to fees from one or both of the Defendants in respect of the first Crown Managed Account (Crown 1), whether pursuant to the Introduction Agreement or otherwise. This is a very generous compromise, particularly in the light of paragraph v. below.

- i. This proposal to defer disclosure of certain Paragraph 1 Reports addresses any possible concerns (which are not accepted) as to the expansion of expert evidence or further disputes as to what issues are to be determined at trial in April 2021, following disclosure of information concerning the other Managed Accounts.*
- ii. As we have pointed out in the past (including in paragraph 129A our client’s Amended Reply), our client does not accept that the other Crown Managed Accounts did not consist of Eligible Investments. However, relevant facts to allow our client to go further and to plead a positive case that Crown 2 and 3 (or other accounts) followed the Current Strategy have been deliberately concealed by your clients (to which we refer*

further below). Our proposal would defer any claim with respect to fees potentially due to our client in respect of Crown 2 and 3, along with any other Managed Accounts, until after the trial in April 2021.

- iii. [Fact that (the then Leading Counsel) resisted disclosure only of other managed accounts, on basis they should be disclosed only if Musst won.]
- iv. *“This proposal is a pragmatic resolution to an issue that will otherwise have to be addressed before the Chief Master, not least in the context of your client’s ongoing breach of the March Order.”*
- v. *Further, this issue must be reviewed in the light of your recent disclosure ... of [the Adler email] [recites part]. It is unclear why this key piece of evidence was not disclosed upon Extended Disclosure in 2019. Please explain as a matter of urgency.*

This contemporaneous piece of evidence establishes that, at a minimum [Crown 2] pursued the same strategy as Crown 1 .. and it is therefore relevant to our client’s claim..... All representations [that it pursued a different strategy] are now shown to be false, causing or clients to be misled in respect of Crown 2 and impeding the orderly progression of these proceedings.”

- (3) Reserves right to amend its case to plead breaches of contract and quantum meruit in the light of Adler’s email.

(c) 16.10.20

(Astra), replying to CB proposal.

- (1) Will disclose further position appraisal reports and PTR’s to 21.4.20.
- (2) *“We agree that the issue of Crown II and Crown III and other investors should, if it comes into play and becomes necessary, be addressed following the trial in these proceedings consistent with the direction of Deputy Master Bartlett at the CCMC. However, there is no basis for your client to seek to address such matters in the context of this application; any consequential disclosure following trial should obviously be addressed at that point and not before. It is inappropriate and wasteful to argue over those matters now.”* (Agreement to leave over claims in relation to other Crown accounts to after the trial.)

- 16. On 22 October 2020, there was a consent order in the Contract Claim. Astra agreed to provide reports on 2B and Crown I up to date (previously they had been supplied only up to April 2016), to search Mr Mathur’s and Dr Adler’s mailboxes for emails to and from certain email addresses, to provide a statement from Mr Mathur himself; and to pay a contribution towards the costs of Musst in a sum of £45,000. Astra draw attention to how there was no reference in the consent order to the revisiting of Crown II and Crown III and other investors after the trial if necessary. Musst says that

although it was not expressed in the consent order, this was the basis on which there was agreement between the parties.

17. On 2 November 2020, Chief Master Marsh dismissed an application on the part of Matrix to have its claim heard at the trial to be heard between Musst and Astra. It was emphasised on behalf of Astra that Astra did not wish to lose the trial date, and Chief Master Marsh stated that the current trial listing was not to be put at risk.
18. On 6 November 2020, Musst served Re-Amended Particulars of Claim by consent (which was silent about Crown II and Crown III). On 12 November, the first of various drafts of re-re-amended particulars of claim was served, with limited amendments in support of the existing claim for books and records that there was reason to suppose that Crown II and Crown III followed the current strategy in the light of the Adler email (but, given the agreement to defer issues, not claiming that they actually did follow it). The letter referred to the failure to explain the late service of the Adler email.
19. The letter added the following, again quoting from Musst's chronology:

"21. Second, given the proximity of trial, our client is not, at this late stage, in a position to advance a claim in these proceedings that the investments in Crown II (and Crown III) were or are in fact Eligible Investments. This is because of your clients' conduct, as we have said above, in misleading our client about the nature of the investment strategy for Crown II (i) back in April 2015; (ii) again through your firm in December 2019; and (iii) in refusing to disclose any relevant documents relating to it and to Crown III in the Contract Claim, despite our client's repeated requests (and the Order of Chief Master March dated 2 March 2020), until the quite separate disclosure of Mr Adler's February 2016 email in the Defamation Claim (on 18 September 2020). ..."

22. [Following the discovery of the Adler email we raised the issue with you on 13.10.20.] *"However, by then, it was not realistically possible to conduct the trial within the existing timetable or within the existing cost estimates if issues relating to Crown II were to be added to it. ..."*

23. [If (Musst) succeeds in proving its claim and obtaining an order that it is entitled to inspect the books and records on Crown 2 and 3 under the existing claim, then Musst will be entitled to seek an order, if appropriate, for payment on these accounts to the extent they follow the current strategy.]

24. However, and for the avoidance of doubt, we also put your clients on notice that our client reserves the right, following trial in these proceedings, to bring a fresh claim against Astra LLP and Astra UK even if for some reason, it is not granted the right to inspect the books and records of Crown II and Crown

III (or indeed any other Crown account except Crown I). This claim, in broad outline, would be on the footing that:

- i. The Octave Contract was novated to Astra LLP, or to Astra LLP and then to Astra UK; or at least to Astra LLP and Astra UK took over the benefit of our client's introductions to Crown even if there was no novation;*
- ii. The Crown II and Crown III accounts did in fact follow the Current Strategy (so that our clients are entitled anyway to payment of fees on the same), as can be reasonably inferred from Mr Adler's email; and*
- iii. Your clients negligently misled our client into believing otherwise on Crown II; and both on Crown II and Crown III they deliberately concealed the true position, in breach of the duty of good faith in clause 6.1 of the Octave Contract, or (on the unjust enrichment claim) of the duty at common law where one person reasonably depends upon another for information. In consequence, our client did not, as it would otherwise have done, pursue your clients for the payment in these proceedings on Crown II and Crown III (or any other Crown account save Crown I) to which it was in fact entitled."*

(This was the first time that Musst mentioned the possibility of separate proceedings).

20. The response of Astra of 27 November 2020 also requires careful consideration. This too is contained in Musst's chronology which reads as follows:

- (1) Explains "background", alleging that Musst has not made any claim beyond the contributions governed by the 2B Contract and Crown Contract. Refers to DM Bartlett's order, and then continues:

"7. Our client's Disclosure Certificate served in October 2019 followed this approach. Your client did not seek to appeal the Deputy Master's decision, or seek an order requiring us to conduct a wider search. As made clear to you in our third letter of 5 December 2019, your client would need to amend its pleading in the event that it wished to bring any claim in relation to Crown II (or Crown III). You did not respond to that letter.

8. Your client also sought to advance a formulation of the expert evidence order that extended beyond [Crown 1 and 2B], but CM Marsh denied this, so the

scope of extended disclosure is limited by reference to the 2B and Crown 1 contracts.

9. Contrary to paragraph 12 of your letter, our clients accepted (as set out in paragraphs 8 and 9(i) of the Eighth Witness statement of Lucas Julian Moore) that the wording of the Specific Disclosure Order in principle extended to “the managed accounts of (i) 2B and/or Crown (i.e. it was not restricted to the 2B Contract and Crown Contract). However, as set out in our clients’ disclosure Certificate dated 14 May 2020, no documents recovered by our clients’ searches were disclosable by reference to the categories set out.”

Goes on then to say:

“11. In the context of compromising your client’s further specific disclosure application, the parties agreed that no disclosure would be provided in relation to Crown II and III and that the issue of Crown II and III and any other investors would be addressed following the April 2021 trial if necessary.”

Goes on, in this regard to rely upon (a) CB’s 13.10.20 letter proposing that Astra disclose documents within 21 days of judgment; (b) PHB’s letter of 16.10.20 agreeing that if the issue of Crown II and Crown III and other investors comes into play, it should be addressed following the trial, and (c) *“the Consent Order dated 22 October [which] reflects this position, and we note the acceptance within paragraph 21 of your letter that “given the proximity of trial, our client is not, at this late stage, in a position to advance a claim in these proceedings that the investments in Crown II (and Crown III) were or are in fact Eligible Investments”.*

- (2) Under the heading “Proposed Amendments”, objects in para 15(ii) to the proposed amendments on various grounds, including that they are *“proposed too late in circumstance in which it is common ground that there is no scope within these proceedings for your client to advance a claim to the effect that contributions made in relation to Crown II (and Crown III) i.e. contributions other than pursuant to the 2B Contract and Crown Contract, were or are Eligible Investments”.*
- (3) By reference to the Adler email, the letter added the following (not referred to in the chronology of Musst):

“17. Furthermore, your proposed amendments gain nothing from Dr Adler’s email, from which your client seeks to draw serious and unsubstantiated inferences as the purported basis for justifying your client’s attempted volte face. Not only was this document disclosed in September 2020 and known in the context of the parties’ agreement as set out in

paragraph 8 above, but the allegation of concealment improperly made in your letter falls flat given the contrary assertion by reference to it in the pleading that “reasonable grounds” for an order of inspection are justified.

18. It should be obvious to you that the over-arching investment objective and strategy in relation to each of the accounts / funds referred to within Dr Adler’s e-mail, including Crown I, Crown II, 2B and ASCIL, as set out in the applicable TAAs, IMA and prospectus, is broad, permissive and substantially similar from an investor perspective. Accordingly, there was and is ample remit for the implementation by our clients of multiple specific investment strategies from vehicle to vehicle.

19. It should also come as no surprise to you that the specific investment strategies implemented by our clients were refined and would change over time, such that the contributions made pursuant to the 2B Contract/Second 2B Contract and Crown Contract/Second Crown Contract would in any event have ceased to be for the Current Strategy by 31 December 2014 or 31 December 2015 at the latest. From the outset, this was and was known to be a time-limited opportunity. For example, on 21 May 2012 in an e-mail to Sunil Chandaria, Saleem Siddiqi expressed surprise at the realisation of the limits of the opportunity when he wrote: “when you told us that his [Anish] capacity/IRR are far less than what is being stipulated, it came as a bit of a rude surprise to me given that we have been out there saying something else.” In addition, on 26 June 2013 Graham Duncan sent an e-mail to Saleem Siddiqi explaining that the “opportunity set is evaporating faster than he or almost anyone would have predicted”.

20. The definition of Current Strategy being far narrower than the scope of the investment objective and strategy and that being separate from a CLO/real estate strategy means that it must be clear to you that there is no inconsistency between Dr Adler and Mr Holdom’s positions. Your attempt to draw serious adverse inferences and/or argue the contrary in your letter is denied and without any objective merit at all.”

21. The response of Musst of 16 December 2020 was to say that the parties had agreed that the issue of other managed accounts (including Crown II and Crown III) would be addressed following the April 2021 trial, if necessary. It pointed out that the latest amendment did not plead that Crown II and Crown III were actually Eligible Investments. Again, the question was asked about the late disclosure of the Adler email.
22. On 18 January 2021, Astra repeated that the Claimant was not *“in a position to advance a claim in these proceedings that the investments in Crown II and Crown III were or are Eligible Investments. Your letter of 16 December 2020 also agreed “that the issue of other managed accounts (including Crown II and III) will be addressed following the April 2021 trial, if necessary”.* On that basis, the proposed amendments that pertained to Crown II and Crown III were therefore unmeritorious and inappropriate. As regards the Adler email, the allegations of concealment were rejected, and it was stated: *“Your apparent misunderstanding in relation to Dr Adler’s email was also fully addressed in our letter dated 27 November and your unjustified attempt to utilise a single email as the basis to justify a late and unjustified volte face and wide-ranging amendment to your client’s pleaded case is transparent.”*
23. A further more limited draft re-re-amended particulars of claim was served in March 2021 but stating that there would have to be a further hearing in any event in relation to the investments in Crown II and Crown III in the event that the current claim succeeded: see communications of 19 and 26 March 2021. Musst persisted in its complaint about the late disclosure of the Adler email and in what it believed was a failure to give an explanation for the lateness. Astra continued to object to the latest proposed re-re-amendment. In particular in a communication dated 30 March 2021, Astra stated: *“In circumstances in which it is common ground that a further hearing beyond the trial would be required in any event to address matters arising in respect of Crown II and/or III, we fail to understand why an amendment to the scope of the relief sought by your client is required at this point. The question of relief would surely be better addressed at any such hearing and in the light of the Court’s findings at trial.”*
24. On 31 March 2021, Musst replied to the foregoing by stating:

“With reference to the final paragraph of your letter [of 30.3.21], the parties have of course agreed that a further hearing beyond the trial will be required to address matters arising in respect of what you have labelled the Crown II and/or Crown III accounts. However, as you are aware, our position and our client’s pleaded case have, since the outset of these proceedings, included a claim for books and records in relation to, inter alia, Crown II and Crown III. That has not changed and the case will be pursued at trial on that basis without prejudice to what further steps our client may take in relation to those managed accounts subsequent to trial.”

25. On 30 March 2021, there was served by Musst its skeleton for the pre-trial review (“PTR”). This stated at para. 39 the following (which was also repeated in similar terms at para. 274 of Musst’s opening skeleton at trial):

“By the time this email was disclosed (approximately one year after Extended Disclosure in the Contract Claim), these proceedings were already at an advanced stage. It was agreed between the parties that any questions in relation to non-payment in relation to Crown II could not be conveniently dealt with in these proceedings (i.e. because of the need for disclosure and expert evidence), but would have to be dealt with in subsequent proceedings, which anyway may well be necessary if Musst succeeds in its claim in these proceedings to ascertain precisely what is due to it regarding the totality of its client introductions in the light of Astra’s books and records. Accordingly, Musst did not seek to amend its claim in these proceedings to claim a breach of contract by reason of non-payment in relation to Crown II, but has left that issue over (with agreement from Astra) to any subsequent proceedings.”

Astra did not object to this or say that this was either inaccurate or inappropriate.

26. On 6 April 2021, Astra again objected to proposed re-re-amendments. On 9 April 2021, Musst issued an application to amend and provided a yet further draft. On 20 April 2021, a tenth witness statement of Mr Lucas Moore was served in opposition to the application. On 23 April 2021, Musst agreed to its application being dismissed by consent, saying that it had been concluded that there was no need to pursue the point given the overriding objective. In the opening skeleton for trial, in para. 274, Musst repeated para. 30 of its PTR skeleton that issues on Crown II were to be dealt with in later proceedings. The position of Musst, contradicted by Astra, was that access to the books and records in respect of Crown II and Crown III were within the existing pleadings.
27. The trial commenced on 27 April 2021. On 29 April 2021, a claim form in the Second Action was issued. This was not communicated at the time by Musst to Astra. Musst says that its purpose was due to potential limitation issues arising on a claim for a misrepresentation by Mr Holdom alleged to have been made on 30 April 2015. The trial lasted until 21 May 2021. On 10 June 2021, having found out about the Second Action, Astra wrote to the Court. The claim form in the Second Action was served with particulars of claim on 27 August 2021. There was correspondence between the parties about funding and security for costs in the Second Action. On 29 September 2021, Astra issued its application to strike out the Second Action and for security for costs. On 17 December 2021, judgment was given in the First Action. On 25 February 2022, Mr Viegas made a statement in opposition to the strike out application. In a statement in response, Mr Lucas Moore stated that on disclosure of the Adler email, Musst could and should have sought to amend the Contract Claim given that the trial was not listed until the end of April 2021.

IV The law

28. The power to strike out a statement of case under CPR r3.4(2) exists where it appears that:
- (a) the statement of case discloses no reasonable grounds for bringing or defending the claim;
 - (b) the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
 - (c) there has been a failure to comply with a rule, practice direction or court order.
29. The power to give summary judgment on an application by a defendant on the whole of a claim or a particular issue under CPR r24.2 arises where:
- i) the claimant has no real prospect of succeeding on the claim or issue; and
 - ii) there is no other compelling reason why the case or issue should be disposed of at a trial.
30. The power to grant summary judgment or strike out a case for abuse of the court's process includes the re-litigation of issues which were raised or should have been raised in previous proceedings. This engages the principles described by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at paras. 17-26 that are covered by the portmanteau term "res judicata". These include:
- i) "Cause of Action Estoppel": Claims that seek to relitigate a cause of action held (or not) to exist in earlier proceedings (Lord Sumption's first principle). This prohibits a party from contradicting a case previously ruled upon. Lord Sumption stated at para.22: "*(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.*" This was expressed by Lord Keith in *Arnold v National Westminster Bank* [1991] 2 AC 93 at 104 as follows, namely: "*Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negating the existence of a cause of action.*"

- ii) “Further Relief Estoppel/Merger”: Further claims based upon a successfully brought cause of action, including a claim that seeks to recover further damages. This is sometimes considered a type of Cause of Action Estoppel (see Phipson on Evidence 20th Ed. para. 43-15) but can also be described by the doctrine of Merger which treats a cause of action as extinguished once judgment has been given (Lord Sumption’s second and third principles). Rather than preventing a previous claim being contradicted, this doctrine prevents parties from reasserting and extending their previous claims: see *Republic of India and Another Appellants v India Steamship Co. Ltd. (sub nom The Indian Grace)* [1993] AC 410 at 420-421, where it was held that in claims for breach of contract, damages were not essential to a claim. The critical questions, in a claim for breach of contract, are whether the alleged breaches of contract are the same, or if different breaches are alleged, whether the new claim relies upon the same factual basis.
- iii) “Issue Estoppel”: Claims that are founded on an issue decided in earlier proceedings even though in respect of a different cause of action (Lord Sumption’s fourth principle). Lord Sumption stated:

At para. 17: “Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding the parties: Duchess of Kingston’s Case (1776) 20 State TR. 355. Issue estoppel was the expression devised to describe this principle by Higgins J in Hoysted v. Federal Commissioner of Taxation (1921) 29 CLR 54, 561 and adopted by Diplock LJ in Thoday v. Thoday [1964] 181, 197-198.”

At para.22: “(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.” It has been noted that such evidence must entirely change that aspect of the case (Phipson on Evidence 20th Ed. para. 43-43).

There was a qualification to the above at para. 22 as follows:

“The relevant difference between the two was that in the case of cause of action estoppel it was in principle possible to challenge the previous decision as to the existence or non-existence of the cause of action by taking a new point which could not reasonably have been taken on the earlier occasion; whereas in the case of issue estoppel it was in principle possible to challenge the previous decision on the relevant issue not just by taking a new point which could not reasonably have been taken on the earlier occasion but to reargue in materially altered circumstances an

old point which had previously been rejected. He [Lord Keith] formulated the latter exception [in Arnold v National Westminster Bank above] at p 109 as follows:

“In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result.”

- iv) “The rule in *Henderson and Henderson*”: Circumstances as first formulated in *Henderson v Henderson* (1843) 3 Hare 100, which prevent a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier ones (Lord Sumption’s fifth principle). In *Henderson*, Wigram V-C said, at 114–116 (quoted by Lord Sumption at para.18):

“In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit

in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is, whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule.”

- v) “Abuse of process”: A general procedural rule against abusive proceedings (Lord Sumption’s sixth principle). The leading case is *Johnson v Gore Wood* [2002] 2 AC 1, but a helpful summary of the principles was given by Clarke LJ in *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14 at paras. 49-53:

“49. The principles to be derived from the authorities, of which by far the most important is Johnson v Gore Wood & Co [2002] 2 AC 1, can be summarised as follows:

i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

iii) The burden of establishing abuse of process is on B or C or as the case may be.

iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

v) The question in every case is whether, applying a broad merits based approach, A’s conduct is in all the circumstances an abuse of process.

vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.”

31. In carrying out its assessment of alleged abuse of process, the court should take into account compliance with the *Aldi Stores* requirements. These derive from the judgment of Thomas LJ in *Aldi Stores v WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748 at paras.30-31. In essence, where a party wishes to resolve issues between it and another in more than one set of proceedings, to avoid subsequent

arguments as to res judicata, estoppel and abuse of process and to ensure the court's resources are being used appropriately, the parties need to raise the matter with the court. Reference should also be made to *Tinkler v Ferguson* [2020] EWHC 1467 (QB) at paras.50-51 which quoted from recent Court of Appeal authority that had confirmed the mandatory nature of the *Aldi* requirements:

“A claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court’s process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides”

32. The failure to comply with the *Aldi* requirement may not, on its own, be a reason to strike out a case as an abuse, but it is an important factor to be taken into account: see *Otkritie Capital International Ltd and another v Threadneedle Asset Management Ltd and another* [2017] EWCA Civ 274 at para.8 where Arden LJ (as she then was) also stated at para.48:

“If there is a view among commercial practitioners that the Aldi guidelines are subject to exceptions or optional, I would remind them that (following this decision) there will be at least five decisions of this Court when this Court has been asked to strike out proceedings because the Aldi guidelines have not been followed. Those who do not observe the practice cannot hereafter complain that they thought that it was a practice to which there were exceptions. The fact that the Aldi guidelines have not been translated into a rule of procedure in the CPR or been made the subject of a Practice Direction does not matter.”

33. Returning to Lord Bingham's speech in *Johnson v Gore Wood (no. 1)* [2002] 2 AC 1 at page 31, it is worth setting out in full a central part of his exposition:

“But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been

raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment¹ which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”
[Emphasis in underlining added.]

34. To similar effect is Thomas LJ's judgment in *Aldi Stores Ltd v WSP Group plc* above:

“49. . . . (i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C. (iii) The burden of establishing abuse of process is on B or C or as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in

¹ This “broad, merits based” approach does not refer to the substantive merits but to the merits relevant to the question whether the claimant should have brought their claim as part of the earlier proceedings (see *Stuart v Goldberg Linde* [2008] EWCA Civ 2).

every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

V Astra's application to strike out/for summary judgment on the grounds of res judicata and related grounds

(a) The case of Astra

35. Astra relies first on the fact that there was reference to Crown II and Crown III in the Statements of Case in the First Action. The pleaded breaches of the Octave Contract "*as novated*" included (Re-amended particulars of claim para. 103), failing to:
- i) send statements under Cl. 4.1: (a) particulars of "*all Eligible Investments*"; (b) the revenue share due to Musst "*from 2B and Crown, and from such other entity as was introduced...who made an Eligible Investment*"; and (c) the net asset value "*of the Eligible Investments*",
 - ii) make payments and interest under Cl. 4.5 and 4.7 in relation to sums also relating to Crown II and III: "*from 2B, Crown, or from such other entity introduced by the Claimant...*",
 - iii) permit attendance at Astra's premises under Cl. 11.3 "*in order that the Claimant may verify the correct amounts payable to it under the Contract*".
36. Musst sought remedies in the First Action that included the production of statements and payment of all sums and interest that covered Crown II and III ("*2B, Crown and any other entity*") together with an order permitting access to Astra's records and an audit of those records.
37. Astra says that the fatal flaw in the position of Musst as regards Crown II and Crown III was that it did not allege that Crown II and Crown III had followed the Current Strategy and Fund Requirements. Further, it contended that having chosen to allege a specific and limited form of contractual novation by reference to the Crown Contract rather than a more expansive one that novated the Octave Contract generally, a claim against Astra was barred even if Crown II and Crown III had followed the Current Strategy. It contends that it is an abuse of process to plead a wider or different form of novation, having brought the First Action on the basis of a more limited novation. It therefore followed, as was expressly pointed out by Astra to Musst, that without an amendment of the claim, the case as regards Crown II and Crown III could not be advanced. Astra submits that it is now too late to amend the First Action because Musst has obtained judgment: that ought to have been done before trial of the action. It says that it relies also on Musst saying previously that Crown II and Crown III were within the original claim, albeit that Astra has at all times not accepted that that was the position.

38. Astra says that the need for the amendment was never addressed by Musst, and when there were amendments, they did not address the issues in the previous paragraph. In particular, the Claimant succeeded on a novation by reference to Crown I and not by reference to Crown II and/or Crown III and there was no allegation that Crown II and/or Crown III followed the Current Strategy. The alleged disclosure sought went nowhere without such an allegation. Astra was therefore entitled to hold back on disclosure of Crown II and Crown III. The applications for specific disclosure in that regard were therefore inappropriate and misconceived.
39. In these circumstances, the compromise of the disclosure applications did not have the effect contended for. It was not agreed that Musst could bring further separate claims in relation to Crown II and Crown III after the First Action was concluded. What was agreed was that any disclosure in relation to Crown II and Crown III would have to wait until the court had determined whether or not Musst was entitled to relief in the First Action. This was correct, given the way the claim was pleaded. Musst understood the problems with the way the First Action was pleaded remained.
40. The Adler email did not affect matters. If it were the case that this provided a change in the nature of the case, then the claim had to be amended in order to justify its claim concerning Crown II and Crown III.
41. In respect of the compromise of those applications, there was no free rein to bring a new action, widening the scope of the claims, following judgment on the First Claim. The only matter that was being considered was the scope and timing of disclosure, but not a new claim once the trial was over and the action at an end. Following the compromise, there were abortive attempts to amend the claims, but (a) the amendments were not pursued, and (b) Musst fell short of alleging that Crown II and Crown III followed the Current Strategy.
42. The consequence in the skeleton argument for Astra for the strike out application was expressed as follows (para. 37):

“What was not open to Musst was to proceed to trial on the Original Claim and then bring another claim on the same cause of action, but pleaded in more accommodating terms that it hoped would result in the relief its Original Claim had not achieved; terms which it had been forced to abandon when agreeing to have its amendment application dismissed. This however is exactly what Musst attempted to do. The New Claim should therefore be struck out or dismissed under the res judicata and abuse principles...”

(b) The case of Musst

43. Musst submits that the second claim was different in that unlike the First Action it specifically pleads that (a) the Crown II and Crown III accounts followed the Current Strategy and Astra is therefore liable to pay Musst 20% of the fees received therefrom by reason of the novations to them of the Octave Contract, and (b) Astra acted in breach of contract in not making such payments (see paragraphs 6 to 21, 24(1) and

(2), 25 to 26 of the proposed Amended Particulars of Claim). There is also a claim for negligent misstatement that Astra negligently misled Musst into believing that Crown II did not follow the Current Strategy and deliberately concealed that it did follow it (paragraphs 27 to 40). In the First Claim, Musst made no such positive pleas in relation to Crown II and Crown III because it had not been given any material disclosure in relation to them.

44. It is not inconsistent with the foregoing that relief was pleaded with a view to obtaining disclosure about related entities. Thus, there was sought an order “*for the production of the required statements under clause 4.1 in relation to all payments made to it by 2B, Crown and any other entity introduced by the Claimant who has made an Eligible Investments*”; for payment of all sums due to it in accordance with those statements; an order that Astra allow it to attend its premises to work out the correct sums due to it; and an order for payment: see paragraph 105 in relation to Astra UK and paragraph 113 in relation to Astra LLP.
45. Its approach was therefore that in the event that Musst succeeded, it would seek disclosure of the books and accounts of Astra and might then use this information to obtain payments in respect of any other entity introduced by Musst who had made Eligible Investments. Musst contends that as a result of the late production of the Adler email, Musst had an evidential basis on which to plead a case that Crown II and/or Crown III followed the Current Strategy.
46. The case of Musst is that it was too late to plead this following the receipt of the Adler email, and indeed that in the various formulations of amendments it did not go that far. Shortly after receiving the Adler email, Musst entered into the compromise agreement, which precluded a claim in respect of Crown II and Crown III at this late stage. This would be a matter to be decided after trial and dependent on success on the part of Musst in the claims as then formulated.
47. According to Musst, such potential claims were kept open by the compromise agreement. Musst submits that it is artificial to contend that all that was kept open was the possibility of further disclosure, because disclosure was only a springboard to a potential claim for further commissions. By itself, disclosure was of no purpose. It would assist in making out a case about Astra operating on the Current Strategy in respect of accounts other than Crown I. It makes no commercial sense that disclosure for the sake of disclosure would be the purpose of the compromise.
48. It was submitted on behalf of Musst that:
 - (i) the purpose of the compromise was to defer to the end of the trial the issues as to disclosure and other claims for commissions in respect of accounts other than Crown I;
 - (ii) the parties knew and understood that this was the case;
 - (iii) the compromise confined the trial to the Crown I account;
 - (iv) it remained following the trial for the Court to consider the form of any further litigation in respect of other accounts in the light of (a) the

findings in the trial, (b) the Adler email, and (c) other documents which might be sought by way of further disclosure;

- (v) there was no suggestion by Astra at the time of the compromise or before the trial that the effect of going on to trial would bar any further claims after the trial by reference in particular to Crown II and Crown III (other than for disclosure for its own sake).

(c) Discussion

49. The starting point of the argument of Astra is to identify parts of Musst's pleadings which are couched in general terms about disclosure and failures to pay commission, that is to say from such other entity as was introduced by Musst who made an Eligible Investment. Astra says that where a general claim had been made, but the specific claim had only been by reference to Crown I, this barred Musst from a claim after the trial (or in a separate action) for any further relief beyond that obtained in the first trial. Astra says that without a specific claim in respect of a failure to pay commission as regards Crown II and Crown III, and that without amendment prior to trial, it is now too late to make that allegation either in a separate action or by way of amendment.
50. In my judgment, this overlooks the fact that there was no specific allegation of breach of contract in failing to pay commission in respect of Crown II and Crown III. It does not follow from the general terms of para. 103 of the Re-amended Particulars of Claim that there was such an allegation. As noted elsewhere in this judgment about the submissions of Astra, the meaning and effect of the pleaded case must be understood in context: see para. 9 above and para.107 below. It was deliberately not making the allegation until after there was disclosure of documents to justify such an allegation. Indeed, the party with knowledge of what had actually occurred contended that there had been no Eligible Investments of Crown II and Crown III, and without disclosure, there was nothing with which Musst could contradict this.
51. It therefore follows that very general words in the Re-amended Particulars of Claim did not introduce any such allegation of breach of contract in the pleadings as they stood to trial. Further, the draft amendments which were made, and then not pursued to application, did not contain allegations of breach in failing to pay commissions in respect of Crown II and Crown III.
52. On the contrary, as between the parties, the making of a claim for breach of contract in failing to pay commissions in respect of Crown II and Crown III was kept open. Astra did not provide disclosure in respect of Crown II and Crown III because there was no claim for breach of contract in respect of commissions in respect of Crown II and Crown III. When they came to provide the Adler email, that was not because of a contractual claim, but it was by reference to damages arising out of the claim in defamation. In the meantime, Musst was pressing for the wider disclosure with a view to considering whether a claim could be made for breach of contract of a broader kind than that specifically alleged thus far.

53. It is necessary to consider whether Musst has brought about this situation. It submits that it has not done so for the following reasons, namely:
- (i) it relied on representations to the effect that the Crown II and Crown III accounts had different strategies from the Current Strategy, in particular from Mr Holdom;
 - (ii) it did not have disclosure from Astra in respect of Crown II and Crown III. As noted above, there was a dispute between the parties as to whether that disclosure was required under the court orders which had been made;
 - (iii) it did not receive the Adler email until September 2020, and it believes that it should have received that email at an earlier stage.
54. Musst's Original Claim pleaded only that the Crown I account followed the Current Strategy, and the breach pleaded by virtue of non-payment was only in relation to the Crown I account: see paras. 43 - 49, and 102-103. The relief sought went wider, because it sought an order "*for the production of the required statements under clause 4.1 in relation to all payments made to it by 2B, Crown and any other entity introduced by the Claimant who has made an Eligible Investment*"; for payment of all sums due to it in accordance with those statements; an order that Astra allow it to attend its premises to work out the correct sums due to it; and an order for payment: see paras. 105 and 113. That relief envisaged obtaining disclosure of books and records in order to consider if any of these accounts followed the Current Strategy so as to entitle Musst to payments on them.
55. The inevitable consequence of this (and indeed the implication of Astra's conduct) was that the issue as to whether these accounts followed the Current Strategy and were caught by the alleged novations would not and could not be dealt with at the trial which, by early October 2020, had already been fixed to begin on 29 April 2021. As Musst has submitted correctly, in my judgment, there was not enough time by the disclosure of the Adler email for the following to take place, namely:
- (i) for the material relating to Crown II and Crown III to be gathered by Astra pursuant to a further order of the court (the date fixed for the hearing was 22 October 2020);
 - (ii) for it to be considered by Musst and its lawyers;
 - (iii) for it to be considered by its financial expert (Mr Aldama) together with all the other material he already having to consider on Crown I and 2B;
 - (iv) for an amendment, if appropriate, to be made by Musst to its current proceedings to plead that Crown II and Crown III did follow the Current Strategy;
 - (v) for a further amended defence to be put in (and a further amended reply); and

- (vi) for expert reports to be prepared on it by both Mr Aldama and Mr Finkel and for them to discuss the same; and
 - (vii) for all of this to be fitted into the 13 days allowed for trial.
56. By the time of the disclosure of the Adler email, there was most unlikely to be any time to bring on such a claim with the trial. The reasons for that are as follows:
- (i) Astra made it clear by its conduct that nothing should jeopardise the trial. At the hearing on 2 November 2020, when Matrix sought to intervene in the proceedings and to bring its own claim as part of them, Astra, through Mr Boardman QC, emphasised that Astra did not want to lose the 29 April 2021 trial date; and the Chief Master himself said at the hearing that the current listing of 29 April 2021 was not to be put at risk. Hence, there was no question of allowing Matrix to be joined, because, as he held in his judgment, the trial could not go ahead on 29 April 2021 if it were joined;
 - (ii) by parity of reasoning, there would have been no question of putting the trial date at risk, just so as to enable an (inevitably) late claim in relation to Crown II and Crown III to be decided at the same time. It is to be noted that the case had previously been postponed. The trial of the Contract Claim had already been adjourned once, from June 2020 to April 2021. (This was pursuant to the Chief Master’s order on 24 January 2020 in the light of the joinder of the defamation proceedings.);
 - (iii) it would have taken some time to formulate the amendment and the evidence in support, and by the time a contested application was heard, the trial would be imminent;
 - (iv) there was already a lot to be decided at the trial, and in the event that certain parts of Musst’s case failed, the need for a further trial would almost certainly have fallen away.
57. In any event, in the face of an application for further disclosure relating to Crown II and Crown III, Astra entered into a compromise agreement with Musst. The effect was to preclude further disclosure being sought in respect of Crown II and Crown III (and other investors) until after the trial, and to be addressed then “*if it comes into play and becomes necessary*”. This was in the light of Astra’s concerns about the expansion of expert evidence and further disputes that might arise if the disclosure were to be given. In its letter of 13 October 2020, Musst’s solicitors stated that its proposal “*would defer any claim with respect to fees potentially due to our client in respect of Crown 2 and 3, along with any other Managed Accounts, until after the trial in April 2021*”. Musst signalled that following the trial, not only would further disclosure be further visited, but so too would the entitlement to further fees
58. It therefore follows that by October 2020, it was apparent that there was no real prospect of the scope of the trial being expanded to the determination of further commissions in respect of other accounts. It was against this background that the

parties entered into the agreement which they did in October 2020. Astra did not refuse to agree or raise the point on the basis that any subsequent claim for commissions in respect of Crown II and Crown III or other accounts would be barred by res judicata or abuse of process or the like.

59. I do not accept that this only dealt with disclosure but precluded the amendment of the claim so as to pursue a claim for commission in respect of Crown II and Crown III. In my judgment, this is based upon an assumption which is not well founded, that is to say that there could be disclosure, but no claim for commission could be advanced. The purpose of the disclosure was to fuel the claim for a commission in respect of Crown II and Crown III. It therefore follows that such an amendment would fall away with the agreement to postpone the disclosure until after the first trial. Even if that were not correct, Musst was entitled reasonably to operate on that premise, since it is at least a tenable understanding of what was agreed. There is no real answer to the question as to what was the point of leaving the claim in respect of moneys due in respect of Crown II and Crown III until after trial unless it was to keep open the possibility of a trial in respect of those issues at a later date subject to the findings made in the first trial: see transcript for 30 August 2022 at p.32G-33C and 35C-35G.
60. It is not necessary for the purpose of considering the strike out submissions to conclude that Astra was guilty of opprobrious conduct e.g. disobedience of a court order as regards disclosure or deliberately misleading Musst as regards the nature of the investments of Crown II and Crown III or deliberately withholding the Adler email. In fact, I conclude that on the information at this stage, Musst was not in a position to have had the knowledge earlier and/or that it did not act in a wrong manner in not bringing an application earlier.
61. In my judgment, it is important to look at the issues from a broad merits perspective, to borrow the language referred to above of Lord Bingham in *Johnson v Gore Wood*. The issue is not the principle of a new second action as opposed to an amendment of the First Action. If an amendment were acceptable, but a new second action was unacceptable, then the matter could be reformulated by an amendment. The issue is whether the end of the trial precluded a new claim whether by way of second action or amendment, namely a breach of contract relating to Crown II or Crown III or any other entity. I am satisfied that the end of the trial did not bar a new claim in the events which have occurred.
62. It is therefore necessary to look at the substance of the new claim rather than its form. In my judgment, the following information is important in connection with the strike out application, namely:
 - (i) The claims for amendments did not introduce a specific claim for commission in respect of Crown II and Crown III. They were relevant to the contention that disclosure of documents was sought, but they did not transform the claim into one for commission.
 - (ii) The reason for a second claim rather than an amendment was because of limitation concerns, especially the times when the commissions might have become due and the timing of the negligent misstatement claim. If it really mattered, then the Second Action could be put into the form of

an amendment in respect of the First Claim. That is not the point. Astra takes issue because it believes that the second claim was inconsistent with the First Claim, which is one of the arguments founding the alleged abuse of process and related challenges. In other words, the issue is not one of form, but one going to the heart of the second claim.

- (iii) In view of the agreement in October 2020, the claim for further disclosure or for further commissions could not be progressed until after the trial. Astra says that another reason against a new claim is that by applying to amend prior to trial and issuing a new claim, Musst acted contrary to that agreement. In my judgment, the abortive amendments did not plead a specific claim for failure to pay commission in respect of Crown II and Crown III and in any event did not affect the agreement that was made.
- (iv) Musst informed Astra of its intention to bring a new claim based on the Adler email in communications on 12 November 2020, 16 December 2020, 19 March 2021 and 31 March 2021.
- (v) Musst informed the Court about its position in its PTR skeleton as noted above. There was no opposition to this from Astra.
- (vi) Consistently with the agreement of October 2020, Astra did not say in the correspondence that this way of dealing with matters was an abuse of process or was otherwise barred. On the contrary, particularly in correspondence of 18 January 2021 and 31 March 2021, Astra referred to the need for consideration after trial to address matters in respect of Crown II and Crown III.

63. The novation point of Astra does not invalidate the above analysis. There is no necessary inconsistency between the novation as found in the trial, and the way that the novation may be expressed in respect of Crown II and Crown III. It is possible to allege a limited novation in order to capture the share of the Crown I investment. A wider novation can be expressed in respect of the Crown II and Crown III investments provided that it does not contradict the novation established in respect of Crown I, as has been done in the Particulars of Claim in the Second Action especially at paras.14, 19, It will be for Musst to prove any novation. Astra will still be able to challenge the existence of the alleged novation in the Crown II/Crown III claim whether on the basis that it is not established on the evidence or that it contradicted the basis on which there was found to be a novation in the First Action. These are matters to be considered in a second action and are not a reason for striking out the Second Action. On the information available at present, there is no reason to believe that the novation in respect of Crown II and Crown III is in contradiction of the novation in respect of Crown I. If it is the case, as I hold that the case can be brought against Crown II and Crown III for the first time in the later action, so it is the case that there is scope for alleging a novation in different and non-contradictory terms from the novation in respect of Crown I.

64. I shall now consider the conclusions by reference to the various formulations and principles described by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at paras. 17-26.

(i) Cause of action estoppel

65. The claims in respect of Crown II and Crown III do not relitigate a cause of action held or not held to exist in the first trial. I accept the characterisation of Musst as regards the different nature of the claims in respect of Crown II and Crown III from the claim dealt with at trial commencing on 29 April 2021. The First Claim was in respect of commission by reference to Crown I and not Crown II and Crown III. Such a claim was not formulated either by the Original Claim or with the amendments which Musst revised and then abandoned. Although the prayer for relief mentioned disclosure which was wider than Crown I, that did not mean that the claim for commission was ever formulated in the first trial. It meant that it would arise for consideration after disclosure was provided. In the event, there was controversy as to whether such disclosure was ordered: it was not provided. The issue of disclosure was postponed, and therefore by necessary inference to any consequential claim for commission in respect of other accounts including Crown II and Crown III until after the trial.
66. Likewise, the position is no different as regards novation. There was a novation by reference to the Crown I claim. There is now pleaded a novation by reference to the Crown II and Crown III claims, which would have to be tested. It would have to be proven and Astra would be entitled to defend by denying the novation. For the reasons above stated, I reject the submission for the purpose of the strike out application that the novation pleaded for the purpose of the claim in respect of Crown II and Crown III contradicts the findings in respect of the Crown I claim. There is no bar in respect of cause of action estoppel.
67. There can be a case where although there are two causes of action technically, they arise out of the same incident. The example given by Lord Goff in *Republic of India v India Steamship* [1993] AC 410 at 421C is that of two causes of action arising out of a fire in a ship in a single incident where breach might have been in respect of more than one term of the contract. This is not the case in the instant case in that the claim in respect of Crown I and Crown II and Crown III are in respect of different investments at different times. It is particularly striking because on Astra's case (which is not accepted by Musst), the Crown II and the Crown III investments were of a different nature in that they were never intended to be for the Current Strategy.

(ii) Further relief estoppel/merger

68. This is not a case of the same breaches of contract being considered with an extension of the damages. It is a case of different breaches of contract, and breaches of contract founded on different facts, that is to say the failure to disclose and/or to pay commissions in respect of Crown II and Crown III is not the same breach of contract and not the same facts as were ruled upon in the case of Crown I.

(iii) Issue Estoppel

69. Astra's submissions are at the same time that any claim in respect of commissions relating to Crown II and Crown III was precluded because the prayer for relief extended to Crown II and Crown III (through disclosure) but not for commissions. It was now therefore too late. In the light of the matters set out above, the points now raised are not points which could and should have been raised by Musst at the trial of the first proceedings on 29 April 2021. The disclosure in respect of other accounts was not provided at that stage. The Adler email was produced too late for it to be practicable for a claim in respect of Crown II and Crown III to be dealt with in the trial. In any event, it was expressly agreed between the parties in October 2020 that any claim by Musst in relation to Crown II and Crown III would have to be deferred until after the trial. As noted above, these features are to be taken into account in respect of issue estoppel, and particularly by reference to the quotation of Lord Keith in *Arnold v National Westminster Bank* above cited by Lord Sumption in the *Virgin Atlantic* case.

(iv) The rule in *Henderson v Henderson*

70. Applying the rule in the circumstances set out above, the points which Musst seeks to advance were not points which the Court could expect Musst to have advanced with the exercise of reasonable diligence in the trial. Alternatively, in the circumstances (including the absence of disclosure in respect of Crown II and Crown III, the late disclosure of the Adler email and the agreement of the parties), there were special circumstances which were sufficient to take the case outside the rule in *Henderson v Henderson*.

(v) Abuse of process

71. By parity of reasoning with the position in *Johnson v Gore Wood* (supra), in which it was evident from Mr Johnson's company's compromise with the defendant solicitors that it was still open to him to bring a claim himself, it would be "*quite unjust to permit [Astra] to resile from that assumption*", that is, the assumption that it would be open to Musst to bring a later claim in relation to Crown II and Crown III: see Lord Bingham's speech at pp33-34. There is no oppression, harassment or unfairness in these second proceedings, nor are they likely to lead to any greater expense than was going to occur under the procedures envisaged under the First Claim (i.e. separate trials, with a trial on Crown II and III to go second).
72. Applying the broad merits approach of Lord Bingham in *Johnson v Gore Wood*, the second proceedings do not constitute an abuse of the process of the court. This is having regard in particular to the points made above including:
- (i) the practical inability to have tried the matters in the Second Action within the First Action, not least by reference to the absence of disclosure about Crown II and Crown III and the late production of the Adler email;

- (ii) the agreement of the parties in October 2020 as set out above;
- (iii) Musst informing Astra of its intention to bring a new claim based on the Adler email in various communications referred to above;
- (iv) Astra not saying at the time that a further claim would be an abuse of process or was otherwise barred but, as noted above, stated that these matters would be addressed after the trial;
- (v) Musst informing the Court about the position at the PTR on 29 March 2021 and in the opening skeleton argument.

73. Even if there is criticism to be made of Musst’s conduct in not doing more to make and maintain an application to amend and in not informing Astra about the Second Action when it had been brought and any other criticisms of Musst are substantiated, it is still not an abuse of the process of the court to bring the Second Action. This is because in considering this question it is legitimate to ask what would have happened if Musst had expressly sought directions from the Court. If, as Musst submits, the court would not have adjourned the trial, but have allowed Musst to make its second claim to be decided at a later hearing (whether by way of new claim or by way of proposed amendment), there was no prejudice to Astra, and so again there is no question of Musst’s conduct amounting to an abuse of the process: see the *Otkritie* case referred to above at paras 8 and 53.
74. In addition to the foregoing, the decision to strike out is discretionary, and the response must be proportionate in all cases. Further, the remedy to strike out for abuse of process is reserved for clear and obvious cases: see *Municipio De Mariana v BHP Group (UK) Ltd* [2022] 1 WLR 4691 at paras. 177-178. If I had not reached the conclusion that the ground to strike out for the res judicata type grounds, then I would have found that this is not a case which was clear or obvious, such that the Court ought not to exercise a discretionary power to strike out in this case. If the Court had been critical of the conduct of Musst, it would still have been appropriate to consider some alternative sanction other than strike out e.g. by reference to costs, such as in *Otkritie* where the judge ordered the claimant to pay 75% of the defendant’s costs of the strike out application. In the event, the Court concludes that for all of the above reasons, it is not appropriate. The application to strike out by reference to the portmanteau term “res judicata” fails.

VI Striking out for alleged failure to comply with pleading rules

75. There was a short section in Astra’s skeleton at paras. 52-53, not amplified in oral submissions, of a further ground for strike out, namely an alleged failure to comply with CPR 16.4(1)(a) in failing to provide a concise statement of case. The allegation is that the Particulars of Claim are defective in adopting large parts of Musst’s Re-amended Particulars of Claim (“RAPOC”) in the Original Claim. At the hearing,

Astra accepted in oral submissions that there were two “substantial differences”, namely (a) a wider novation was alleged, (b) Crown II and Crown III comprised Funds following the Current Strategy: see transcript 30 August 2022 p.18A.

76. I reject this additional basis for strike out. The case is properly pleaded. The Particulars of Claim in the Second Action are a concise statement of facts comprising 20 pages, adopting what was applicable from the First Action and with some particularisation by reference to other pleadings. Reference is made in particular to paras. 3, 4(4), 10(1)(b) and 12(1) of the Particulars of Claim in the Second Action which contain such cross references. This is unobjectionable particularly because of the connection with the First Action in respect of Crown I. In any event, the particularisation by cross reference is sufficiently clear and the Particulars of Claim in the Second Action concentrates on allegations specific to the claims in respect of Crown II and Crown III.
77. By way of observations only and not intended to be a comprehensive summary of the Particulars of Claim in the Second Action, attention is drawn to the following:
- (1) it sets out in detail the ways in which it is submitted pending disclosure the way in which the Crown II was an additional investment made for the Current Strategy, was made by an Investor (Crown) within Clause 3.1 of the Octave Contract and it was made into a Fund: see paras. 7-12. Likewise, the same applied to Crown III based on the inferences set out in detail at para. 18 pending disclosure;
 - (2) it set out the different ways of establishing a novation especially at paras. 11(1) that as a matter of construction and/or by necessary implication, the novation which applied to Crown I would apply to any current and future investments made by Crown with Astra LLP such as those in Crown II and Crown III which were additional investments made for the Current Strategy by an Investor (Crown) and made into a Fund. Alternatively, there was an estoppel by convention from denying that this was the effect of the foregoing. At para. 14, it set out how Astra UK became bound as Astra LLP had been.
 - (3) it set out how the Octave Contract as novated to Astra LLP applied to the investments made in the Crown III account for the same reasons as it applied to the Crown II account on a proper construction and/or by necessary implication and how there was an estoppel from denying this. Likewise, it set out how Astra UK became bound as Astra LLP had been: see para. 19 of the Particulars of Claim in the Second Action.
 - (4) it set out an unjust enrichment claim in the alternative to the novations: see paras. 22-26 of the Particulars of Claim in the Second Action.
 - (5) it sets out claims based on misstatements at paras. 27 -40.
78. The claim as a whole sets out the facts and matters underlying the various causes of action and which are alleged to give rise to liability in connection with the

investments in Crown II and Crown III in a manner conforming with the rules as to pleading statements of case. The claim does not appear to be lacking in particularity, but if there is any which is lacking, the remedy for lack of particularisation is a request for further information. Accordingly, this head of strike out is dismissed.

VII Astra – strike out/summary judgment on the merits

(a) Astra’s case

79. Further or in the alternative to the strike out ground by reference to res judicata and other related grounds, Astra submits that the claim in respect of Crown II and Crown III should be struck out because there are no reasonable grounds for bringing the claims and/or there should be summary judgment because they have no reasonable prospect of success. In particular Astra submits that there is no merit in any of the following features of the new claim, namely:
- (i) the expansion of the scope of the novation of the Octave Contract;
 - (ii) the positive case regarding Crown II and Crown III having involved investments that met the Octave Contract’s definition of Current Strategy and Funds;
 - (iii) the claim of negligent misstatement founded upon Clause 4.1 of the Octave Contract.
80. As for novation, Astra submits that bearing in mind the limited nature of the novation as found in the first judgment, there is no reasonable basis for reformulating the novation as regards Crown II and Crown III. The correspondence, invoices and payments on which the novation was based in the Original Claim do not mention Crown II or Crown III. The documents pre-date the existence of Crown III. The novation was entirely by reference to Crown I.
81. There was a reference by Mr Holdom to Crown II in correspondence of 4 February 2015 in respect of one relatively small payment, but this was contradicted on 30 April 2015, when it was explained orally and in writing that there had been a mistake, which Mr Holdom maintained in cross-examination.
82. As for whether Crown II and Crown III investments meet definitions of “Current Strategy” and “Funds”, Musst’s own case requires it to prove that qualifying investments were made in Crown II and III that “*followed the Current Strategy*” and “*were made in a managed account which substantially replicated the investment securities and risk profile of ASSCF*”: see Particulars of Claim in the new claim at paras. 11(1) and 13. The reliance on the Adler email is fallacious. Dr Adler explained by saying that the email was talking about the broad terms of the investment mandate under the Trading Advisory Agreement and not the strategy as defined under the Octave Contract. Astra also emphasises that the opportunity identified was expected to be a short term one, say of three years, which period had

expired by the time of the Adler email. It is said that the claim in respect of Crown II is therefore merely speculative.

83. The case in respect of Crown III was “*thinner still*”. Crown III was contracted with Astra UK and was never part of the Octave Contract. Crown II and Crown III were segregated portfolios with different return and risk portfolios: if the case was as contended for by Musst, then more money could simply have been allocated to Crown I. It was said here too that the assertions of Musst were supposition and speculation e.g. previous success with the Current Strategy would mean that Crown would wish to follow the same or the absence of reference to other strategy for the future meant that none was followed: see paras. 18(1) and 18(2) of the Particulars of Claim in the Second Action. Likewise, it was purely speculative to read anything into the references to Crown I being an overflow account for Crown II and Crown III, and it did not inform as to whether the Current Strategy was being followed in Crown II and Crown III: see Particulars of Claim paras. 18(3)-(5).
84. Musst has failed to put forward any cogent case or evidence so as to substantiate its positive claim that the two accounts followed the Current Strategy and met the definition of Fund. It is not appropriate to permit the claim to go on in the hope that something will come up to justify it. As such the claim should be struck out and summary judgment granted in Astra’s favour.
85. As for negligent misstatement or breach of contract, on the premise that Crown II and Crown III did not meet the definition of “Current Strategy” and “Funds”, there was no misstatement or breach of contract. There was no justification for a separate action because there would not have been moneys of sufficient value to justify a separate action. Astra also submit that there was no reason for a duty of care, bearing in mind the contractual machinery for obtaining documents and information. Insofar as additional losses are claimed arising out of a second set of proceedings, there is no justification for this and/or the additional costs should be at Musst’s expense.

(b) Musst’s case

86. Musst places emphasis on the Adler email as evidencing that Crown II was at least following the Current Strategy. Reliance is also placed on the evidence of Dr Adler at the trial where he said that “*our mandates are very, very similar, I know I said identical in one email. It is probably not 100% identical, but very, very similar it is fair to say.*” Although Dr Adler sought to give an explanation about this, that in the email he was only saying that Crown II was governed by the same “*set of rules*”, it did not follow from his distinction that he was saying that Crown II and Crown III did follow a strategy which was different from the Current Strategy. Further, if it was the case that there is little overlap between the assets bought for Crown I and Crown II in 2015, that does not show that Crown II did not follow the Current Strategy. Musst submits that even now Astra has given no particulars as to how Crown II and Crown III actually did follow a different strategy from Crown I.
87. It had been envisaged from September 2013 that LGT would invest not only the initial US\$40 million, but also a further US\$40 million. It is against this background that the Adler email is to be seen and in particular in the reference to a “*very similar if not*

identical strategy". Musst also submits that the suggestion that the investments were not a Fund was untenable: see Viegas para. 71. Musst also relies upon email exchanges between Musst and Mr Holdom of February and April 2015. It relies on how there was a payment by Astra in relation to Crown II in February 2015 and a common management fee for Crown I and Crown II throughout, and that evidence thereafter to the effect that this was in error will be the subject of close cross-examination at a trial.

88. In relation to Crown III, Musst submits that on the basis that Crown I and Crown II followed the Current Strategy, there is an inference that Crown III did so as well. Attention is drawn to the purchase of the same two assets in August 2016 for Crown II and Crown III, which might be inconsistent with the case that they did not follow the same strategies. Musst also submits that no documentary evidence has been produced to show that Crown III did not follow the Current Strategy. Mr Mathur's evidence was that they followed different strategies, but there were some adverse findings about aspects of Mr Mathur's evidence in the judgment, and so this evidence requires particular scrutiny.

(c) The law

89. The principles in respect of an application for summary judgment were conveniently set out by Lewison J (as he then was) in *Easyair Ltd (T/A Openair) v Opal Telecom Ltd* [2009] EWHC 779 (Ch) in the following terms at para. 15. It has often been cited in the appellate courts with approval, for example in the Court of Appeal's judgment in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2010] Lloyds Rep. I.R.; [2009] EWCA Civ 1098.

"As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91 ;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions

made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 ."

(d) Discussion

90. Applying these criteria, the claim is not “fanciful”. The matters raised by Musst carry at lowest some degree of conviction, given the terms of the Adler email and the other matters relied on in Mr Viegas’s statement, especially at paras. 68-74. The words of the Adler email are matters of substance which weigh in favour of Musst’s case, but there are answers to it from witnesses which will need to be seen in the context of the case as a whole. It is not possible to undertake that exercise at this stage, not least because disclosure of the Crown II and Crown III documents has not yet been provided.
91. This touches on the criterion that on the application for summary judgment, the court is not limited to considering the evidence before it, but also the evidence that can reasonably be expected to be available at trial. The absence of disclosure of the Crown II and Crown III documents at this stage is, in my judgment, of significance. The assertions on behalf of Astra, particularly where they contradict or qualify contemporaneous documents have to be viewed with particular scrutiny. Astra has refused to provide further disclosure, despite being requested to do so. It is to be inferred that there are contemporaneous documents about the nature of the Crown II and Crown III investments, which Astra could have chosen to disclose at this stage but have chosen not to do. For the purpose of a summary judgment application, the Court does not need to deal with that by considering if adverse inferences are to be drawn. The Court can simply say that it will take into account that documents will become available which are likely to shed some light on the parties’ respective submissions. That is likely to lead to a fuller investigation into the facts of the case and would add to or alter the evidence available to a trial judge and so might affect the outcome of the case.
92. There is a plethora of points made in Mr Moore’s statements and in Mr Viegas’s statement on which the parties respectively rely. The points are of some detail. It is not necessary to go through each of those points, albeit I have had regard to them for the purpose of the application. Going through each of them would fall foul of conducting a mini-trial, another of the criteria in the judgment of Lewison J.
93. As regards the point about the novation, a trial will require anxious consideration as to whether the novation was too limited such as not to be capable of applying or extending to the position as regards Crown II, and especially Crown III which was not in existence at the time of the novation which has been found. There is at lowest a real prospect that Musst will be able at trial to establish the novation as pleaded by the process of construction and/or implication, and that it will not be an answer to the matters pleaded that there was limited express reference to Crown II and none to Crown III, given all or parts of the matters giving rise to the construction and/or implication and/or estoppel by convention.
94. Likewise the question of the strategy being followed by Crown II and Crown III will also require careful scrutiny, particularly bearing in mind the time which Crown lapsed between the inception of Crown I and Crown II and especially Crown III. Despite such lapse of time as there was, there are significant indicators through the Adler email, paras. 68-74 of the statement of Mr Viegas and the other matters set out under Musst’s case above which provide at lowest a real prospect in the case of Musst that the Crown II and the Crown III investments met the Octave Contract’s definition of Current Strategy and Funds. The attempts to explain away the Adler email may succeed at trial, but at this stage, it is contemporaneous evidence which is capable of

supporting Musst's case. Against this, the points made above under the heading of the case of Astra do not refute the case of Musst such as to preclude the need for a trial.

95. I now refer to the case about mis-statements. If the investments were Eligible Investments, as to which there is a real prospect of success that this will be established at trial, it will still be necessary to consider whether there was a duty of care as regards the statements made on behalf of Astra, and whether the losses claimed under this heading are tenable. There is sufficient in this allegation not to strike it out at this stage. Astra had special knowledge not available to Musst about the characteristics of the investments. It must have known that Musst might rely upon the information provided in respect of the character of the investments, and in particular on the statements to the effect that they were not Eligible Investments. This is not to conclude that there was a duty of care or a breach thereof, but that there is sufficient in the allegation made to conclude that they should not be struck out because there are real issues to be tried both as regards the existence of a duty of care and the allegations of breach and loss.
96. Astra also submits that costs should not be recoverable in a second action where they could be recoverable in a first action. There are issues of law as to when costs which may not be recoverable under CPR in a first action may still be recoverable as special damages in further proceedings where a separate independent cause of action is available: see McGregor on Damages 21st Ed. paras.21-003 – 21-011 and 21-025 – 21-026 where the author expresses the view that there ought to be no bar to the award of such damages in the second action. This area is at least a controversial or developing area such that strike out of the damages claim is inappropriate.
97. Further, Astra submits (para. 74 of its skeleton of 25 August 2022) that the breaches of contract relied on for the failure to provide statements are unsustainable because clause 4.1 depends on a request being made. In my judgement, there is a serious issue to be tried about the breaches of contract and the claim for deliberate concealment for the following reasons, (1) the breach of contract may not depend on a prior request either under clause 4.1 or under clause 6.1 (which may not stand and fall with clause 4.1). Further, there is a compelling reason not to strike out this part of the claim or to give summary judgement, since it is so closely connected with other matters to be tried which may cast light on the sustainability of this or related allegations.
98. It does not follow from Musst's success in resisting summary judgment that there is any clarity as to what will happen from here onwards. There is a large amount of controversy between the parties, and all that is established at this stage is that there are real issues to be tried and that controversy cannot be fairly dealt with at this stage.

VIII The contractual claim for disclosure of books and records

(a) Introduction

99. Musst makes a claim under the terms of the contract that Astra should make available to Musst its books and records so far as they relate to the investments made for Crown II and Crown III. This is pursuant to clauses 11.1 – 11.3 of the Octave Contract.

Musst seeks to identify the particular books and records which are likely to contain the material which will show what these investments are and have been, and whether they have followed the Current Strategy.

100. Astra oppose the application on the basis that if, as they contend, the investments did not follow the Current Strategy, there is no entitlement to contractual disclosure. Astra denies that the relevant investments followed the Current Strategy: there should therefore be no entitlement to disclosure. Musst submits that as part of determining whether the investments are Eligible Investments, it should be entitled to disclosure. Astra submits that that is to put the cart before the horse. If they are not Eligible Investments, there is no right to contractual disclosure.
101. Musst served a separate skeleton argument in connection with this issue, Astra served a skeleton argument in response and Musst served a skeleton argument in reply.

(b) The issues

102. The two main questions which have been identified by Musst are as follows:
- (1) *“Does Musst’s RAPOC and Further Information in the Contract Claim plead a claim for production of statements, or books and records, in relation to all Crown accounts, or does it claim such statements, books and records only in relation to Crown I;*
 - (2) *If Musst’s RAPOC makes a claim in relation to all Crown accounts, is it entitled to see the books and records relating to Crown II and III pursuant to its rights of inspection in clause 11.1 to 3, without first proving that they follow the Current Strategy?”*
103. Since Astra has followed that structure, I too shall follow it, albeit that Astra do not see the issues in the same way.

(c) Musst’s argument

104. In respect of the first question, Musst relies on the following parts of its pleadings, namely:
- (i) paragraph 105(1) of RAPOC claimed as against Astra UK production of statements under clause 4 of the Octave Contract *“in relation to all payments made to it ... since May 2016 by 2B, Crown and any other entity introduced by [Musst]”*;
 - (ii) paragraph 105(2) of RAPOC claimed *“Payment of all sums whether in relation to 2B, Crown or any other entity”*;

- (iii) paragraph 105(3) of RAPOC claimed an order for access to Astra UK's premises so Musst could ascertain the correct amounts due to it; and
 - (iv) paragraph 105(4) of RAPOC claimed an order for payment of such sum as may be found due to it upon an audit.
105. Musst says that the Crown II and Crown III accounts were set up on behalf of the same Crown entity, not different ones, i.e. Crown Managed Accounts SPC. Crown II and Crown III are merely different "divisions" of Crown Managed Accounts SPC. They say that this was recognised in the Agreed List of Issues for the CCMC in the First Action Claim. Therefore, as a matter of procedure, RAPOC includes a claim in relation to all the Crown accounts, including Crown II and III, and for access to its books and records.
106. Musst submits that it does not make any difference that it has not positively averred that Crown II and Crown III consisted of Eligible Investments. Musst says that this was the result of having been told that Crown II followed a different strategy and only having sight of Dr Adler's email of 3 February 2016 when it was disclosed on 18 September 2020. By then, it submits that it was too late to make a positive plea in the first set of proceedings. Musst says that it should not make any difference to the current argument.
107. In relation to the second question, Musst submits that the starting point is clauses 3.1 and 3.2 of the Octave Contract, which provide for Musst's right to a payment of a "revenue share" of 20% of all sums earned and received by Octave from investors who have made an investment "for the Current Strategy", i.e. "Eligible Investments". They then proceed to set out their arguments as to why there is an entitlement to a revenue share in respect of Crown II and Crown III. The submission is that since the judgment decided that there was a novation, this included Crown II and Crown III.
108. Whether or not the investments turned out to be Eligible Investments and in particular invested in the Current Strategy, Musst submits that they are entitled to see the books and documents of Astra *inter alia* in order to determine whether or not the investments are indeed Eligible Investments with a right of Musst to a 20% revenue share. Musst submits that if this were not the case, it would have the consequence of making Astra the arbiter of whether or not they were Eligible Investments. It submits that if there is any ambiguity in the agreement, it ought to be construed in accordance with commercial good sense: see *Wood v Capital Insurance Services Ltd* [2017] AC 1173 at para 11. It submits that it would be an uncommercial consequence for Musst not to be able to see for itself whether or not any investment in connection with the Octave Contract was an Eligible Investment.
109. Musst draws attention to clauses 11.1 to 11.3 of the Octave Contract not set out in my first judgment. They read as follows:
- "11.1 Octave shall keep full, accurate and up to date books, accounts and records of its activities relating to this Agreement, including but not limited to recording any Eligible*

Investments (and the ongoing value of the same) and the payments due to the Introducer (the Records).

11.2 Octave shall maintain the records for a period of 5 years after any termination of this Agreement.

11.3 The Introducer shall be entitled on reasonable notice to attend premises where the Records are located (and Octave shall allow and/or procure access to the same) and to access the Records and to take copies of the same in order to ensure that the correct amounts been [sic] paid to it under this Agreement.” [Emphasis in underlining added.]

110. Clause 11.4 goes on to provide for payment to Musst of any shortfall identified as a result of any audit, with interest and costs; and for it to reimburse any overpayment. Clause 11.5 provides that Musst’s rights survive the termination of the contract.
111. Musst submits that the above obligations are so that Musst can see what is really owed in relation to any investor it has introduced, and to check Astra’s records for itself to see that it has been paid the correct amount. Musst submits that it would not be protected if it was up to Astra to determine whether or not any investment was an Eligible Investment. Musst recognises that there is no clause which expressly sets out what is meant by the phrase “*activities relating to this Agreement*”, but it submits that “*activities*” relate to the Octave Contract whether or not the investments are Eligible Investments. The words are sufficiently wide such that Musst’s right to inspect goes beyond just inspecting records of investments made for the Current Strategy.
112. One way of putting it is that if an investor was introduced with a view to their making an Eligible Investment under the Octave Contract, that triggers the Clause 11 disclosure obligations even if the investor decides in the end to make only a non-eligible investment. They say in the instant case that the effect of the Dr Adler email is that there is reason to believe that the investments of Crown II and Crown III were Eligible Investments and so the disclosure should be ordered in any event.

(d) Astra’s argument

113. Astra submits that Musst takes para. 105 of RAPOC out of context. It takes its meaning from the grounds which precede it. It depends on the underlying right. It submits that the grounds which precede it involve the following:
 - (i) a limited novation which does not extend to all investments made, but only to Crown I;
 - (ii) the rights are limited to disclosure of Eligible Investments only, rather than providing an ability to have a wide ranging enquiry of all investments introduced;

- (iii) even the more restricted disclosure sought around Crown II and Crown III should not be allowed since it puts the cart before the horse: first it must be an Eligible Investment and only then is disclosure required;
- (iv) the wording of Clause 3.1 is limited to Eligible Investments and in any event, the plea that it extends in any wider way is neither pleaded nor sustainable;
- (v) it is not open to Musst to seek relief in relation to anything other than the Crown Contract referring to Crown I in the present claim. If it were otherwise, there would be no point to Musst's new Crown II and Crown III claims.

114. The first question is whether Crown II or Crown III contained Eligible Investments. No pleaded case has been advanced, and no determination has been made, that Crown II or Crown III contained Eligible Investments. Accordingly, the threshold condition for Astra's alleged obligation to give disclosure has not been satisfied.
115. As regards the second question, the purpose of the provisions is to determine that the right sums owed by Octave to Musst are paid. It is not to enable Musst to engage in a fishing expedition. What Musst wants to do is to ignore the contractual machinery for dispute resolution and use a contractual right of audit to seek a wide-ranging disclosure order from the Court to support its new claim to Crown II and Crown III. Musst has no such contractual entitlement.

(e) Discussion

116. Musst's claim to contractual disclosure must fail. As a matter of construction, there is no claim in the First Action other than by reference to a failure to pay the sums due in respect of Crown I. The contractual right to disclosure is to be seen in that context. The submission made by Astra that para. 105 of RAPOC is to be seen contextually is correct. It affords a right to disclosure as regards the Crown I investments which have been pleaded.
117. The entitlement in the First Action does not extend to Crown II and Crown III which has not been pleaded. It does not matter if it is the case that that might be the result of mis-statement that they did not follow the Current Strategy and were not Eligible Investments. That remains to be decided, but it is putting the cart before the horse to assume in the First Action without more that they were Eligible Investments or that it is relevant that the Court might find in due course that they were Eligible Investments.
118. I reject the arguments of construction that words like "relating to" or words saying that the right to disclosure includes various matters opens up a right to disclosure of documents in respect of investments which were not claimed to be Eligible Investments in the First Action. There is no reason to find that.

119. I do not accept the argument that Musst should be entitled to a trawl of investments which were at that stage not contended to be Eligible Investments. The argument that it makes commercial sense to construe the Octave Contract as such is to assume that the parties would have intended to permit a trawl of investments made by Astra in respect of which Musst did not have or may not have an entitlement to a share. That makes less commercial sense than the argument that Musst should be entitled to test their suspicions. If it were the case that such a wide trawl was intended, that could have been provided for in the Octave Contract, but it was not.
120. There is a separate issue in respect of the Second Action relating to Crown II and Crown III, and which may be independent of the arguments relating to contractual disclosure. That concerns the rights under CPR and at what point disclosure might be obtained. Although this is not very far removed from the scope of this action, it may arise in the Crown II and Crown III action at the stage of disclosure or on a specific application. In view of the way in which this application has been made by reference to contractual disclosure, it is inappropriate for the Court to express a view about the scope of and the timing of CPR disclosure other than to say that, on the basis that the Second Action is not struck out (as I have held it should not be), it is to be considered in the Second Action.
121. I make no finding as regards the timing of the disclosure in the Second Action. I have found that the Second Action has a real prospect of success without disclosure having taken place. It remains to be seen separately from my judgment whose case will be supported by the disclosure under CPR in the Second Action, that is to say whether disclosure under CPR will confirm Musst's or Astra's case. It also remains to be seen whether the right to contractual disclosure will be established in the Second Action. For the moment, the claim for contractual disclosure within the First Action is dismissed.

IX Costs of the consequential hearings of 17 December 2021 and 21 January 2022

122. There remains to be determined the costs of the consequential hearings of 17 December 2021 and 21 January 2022, which led to a judgment of 18 March 2022 neutral citation number [2022] EWHC 629 (Ch). These were to be determined in the consequential hearing and were argued fully in the written skeleton arguments in preparation for the hearing of 30 and 31 August 2022. They were set out in Musst's skeleton argument at paras. 58-65 and in Astra's skeleton argument at paras.79-84. There were also matters raised in writing by Astra at paras. 85-87 which require consideration. It had been expected that the submissions would be supplemented orally in the course of the hearing, but there was no court time available at the end of the two day hearing. The parties agreed to supplement submissions in writing without the need for a further oral hearing. To this end, they have provided submissions of Musst on 13 February 2023 and of Astra on 15 February 2023.
123. Musst submits that the costs should follow the event, it was the successful party and, in several respects, the orders made have been in its favour. Astra submits that unnecessary costs have been incurred, and that it has been the overall winner in relation to the hearings of consequential matters. It submits that 50% of the costs of those hearings should be paid by Musst to Astra.

124. I shall first refer to the respects in which Musst has succeeded, then to the matters which have not been decided, and then to the respects in which Astra has succeeded.

(1) The respects in which Musst has succeeded

(a) The costs of the Contract Claim

125. Astra challenged its liability to pay the entirety of the costs of the Contract Claim. At para. 28 of the judgment of 18 March 2022 there are set out four heads under which deductions were sought. In my judgment, Musst have been substantially successful in resisting a deduction in respect of the costs of the Contract Claim. Astra did not make out its contention that the Musst parties had made unreasonable claims: see paras. 29-32. Musst did not overreach itself in negotiations: see para. 33-35. The point relating to the application to exclude the without prejudice material did not justify a departure in relation to the costs: see para. 41-43. As regards the abortive amendment application, they are adequately dealt with by the order that the costs of and occasioned by the amendment application should be paid by Musst: see paras. 36-40.

(b) Payment on account of costs

126. Musst was successful in obtaining an increase in the payment on account of costs. It was a significant sum of an additional £143,030: see paras. 44-49.

(c) Interim payment

127. There was a significant matter to consider relating to an interim payment. There was a substantial argument about this both orally and in writing. The point was considered in favour of Musst. The result was that the interim payment ordered was a sum of US \$3,826,952.20 rather than the sum calculated by Astra of US \$2,293,014.86: see paras. 51-66.

(2) Matters not decided

128. The following points were to be decided at a later date, namely:
- (1) The recoverability of Musst's ATE Premium, which would be for the Costs Judge in due course: see para. 17;
 - (2) Astra's application to strike out the 2021 action, as to which there were directions: paras. 67-68;
 - (3) Musst's alleged right to inspect the books and records relating to Crown II and Crown III, as to which there were directions.

(3) Determinations in favour of Astra

(a) The basis of costs in the Defamation Claim

129. Astra accepted that it was liable to pay the costs but resisted a claim for indemnity costs. The Court decided that standard costs were appropriate and rejected the claims

for indemnity costs: see paras. 2-16. In reaching the conclusions which it did, the Court rejected the submission that Musst had behaved unreasonably: see para. 15

(b) The basis of costs in respect of the Contract Claim

130. The Court heard an application for permission to appeal and refused permission. Since then, the Court of Appeal has granted permission in respect of two matters (novation and an issue in relation to Current Strategy).
131. Although the costs of the Contract Claim were awarded to Musst following extensive arguments about major deductions sought, the claim for indemnity costs was rejected: see paras. 18-23.

(c) Permission to appeal

132. It is noted as regards permission to appeal, that the matter subsequently went to the Court of Appeal, but that should not have any effect on the orders as to costs made by this court. Mr Boardman KC dealt with the arguments for permission with admirable brevity. A different order for costs arising out of a successful appeal would be a matter for the Court of Appeal and not for this court. In the event, the permission to appeal argument is likely to be irrelevant because this would be a matter for the Court of Appeal, and in any event, it would be likely to be resolved in favour of Musst to the extent, as occurred, that it follows an appeal where Astra's argument did not prevail.
133. There were also directions which were agreed about the provision of further information: see para. 1 of the order of 17 December 2021. There are issues which are raised between the parties as to how that was arrived at and as to why Musst was not in a position to deal with summaries at an earlier stage. At the hearing of 21 January 2022, Musst was unsuccessful in obtaining further disclosure orders but there was an order for further information. The Court is not prepared to dissect each point which occurred. They were all part of the consequential orders from the order, and no separate order will be made for these matters. In respect of matters which were adjourned to another time, it is unlikely that they gave rise to heavy costs, and, in any event, there was no adjudication in respect of these matters at that stage.

(4) Discussion

134. The Court is used to having extensive hearings after long trials considering a variety of consequential matters. It is usual for the costs of those hearings to follow the event of the action. Thus, a successful party in an action on being awarded costs will usually have the costs of the consequential hearing. That is not an invariable rule. Where justice requires, the Court will depart from that starting point.
135. The Court identifies Musst as the overall successful party in connection with the consequential matters. That is because the most significant matters were resolved in favour of Musst. The three most significant matters were:

- (1) the incidence of the costs of the Contract Claim as to which 100% as opposed to 60% would have been likely to make a difference of hundreds of thousands of pounds and far more than the difference of an indemnity costs order;
 - (2) the amount of the payment on account of costs which made a difference of £143,030 as noted above;
 - (3) the amount of the interim payment: this raised a principle which in turn formed a third ground of appeal of Astra considered by the Court of Appeal in its judgment of 13 February 2023 under the heading “the Funds Issue” and which was dismissed. For the purpose of the interim payment, it had an effect of an additional sum of in excess of US\$1.5 million being awarded. Musst had to come to court in order to be able to obtain these orders and a large part of the hearing was devoted to the argument relating to them.
136. Astra could have sought to protect itself by a *Calderbank* offer, but it did not make any effective *Calderbank* offer. It follows that to the extent that Astra did succeed, the Court would only be concerned with the extent to which those matters increased the overall costs.
137. The points that were put off to another time involved relatively little time and costs. There were other matters dealt with in passing but not occupying so much time and cost that they ought to be the subject of separate costs orders. It is not necessary to consider each and every point that may have been considered in the two day hearing. They become subsumed within a bigger picture and since they are not themselves big picture points, they do not have a significant influence in determining who was the overall winner either in the consequential hearings or in the trial which preceded it nor should they be reflected in an adjustment to the overall costs order.
138. There was a significant amount of argument as to the costs payable in respect of the Contract Claim, a part of which was in respect of the question of whether costs should be assessed on the indemnity basis. There would have had to be a lengthy argument about costs given the argument of Astra that only a part of Musst’s costs should be paid by Astra. Although not a reason for refusing a deduction of the costs as sought by Astra, the matters canvassed on the indemnity costs application gave some flavour and background to the question as to whether there should be an award of all of the costs of the Contract Claim to Musst. As stated in the judgment, the Court was satisfied that it was not unreasonable of Musst to make the submissions as to the basis of assessment which merited serious consideration: see Judgment on Consequentials dated 18 March 2022 para. 23.
139. Looked at overall, as regards the part of the hearing dealing with the issue of the costs of the Contract Claim, there is not sufficient to take this part of the case away from the starting point that (a) Musst was the overall winner of the trial seeking its consequential orders, and (b) Musst was the overall winner of the hearing about consequentials, albeit not winning on every point.

140. The position is different as regards the costs of the defamation claim. In that regard, Astra accepted liability to pay the defamation costs in full to Musst, and the only issue was whether they should be paid on the standard basis or the indemnity basis. The reason or the major reason for instructing junior defamation counsel was to make written and oral submissions in this regard.
141. In my judgment, there ought to be a separate order in respect of the defamation proceedings to reflect the loss on the indemnity costs point. In this regard, there was a measurable additional cost, namely the cost of instructing Counsel on each side to prepare and present the written and oral submissions in this regard. It is also to be distinguished from the costs of the Contract Claim because the essence of the dispute was about the basis of assessment whereas that was only a part (and not the largest part) of the dispute in respect of the Contract Claim.
142. Musst has submitted that it has not included those costs in the costs which it has sought. In my judgment, it is necessary more formally to exclude them. It is not possible on the information before the Court to give a reliable percentage deduction to reflect this. There will be accordingly an order that the costs of and occasioned in connection with the instruction and attendance of defamation counsel in connection with the consequential hearings to include but not limited to their advisory work, skeleton arguments and attendances shall be paid by Musst to Astra. For the avoidance of doubt, this does not include any additional time spent in court during the hearings so there are not to be included any consequential costs (e.g. that of a longer hearing) since the hearing did not go into an additional day and would have taken place in any event. However, this does more than simply deprive Musst of a part of the costs because it involves also Musst paying to Astra this part of the costs. It is made because there was a definable and severable part of the costs which were added to by the costs of the defamation issue not being agreed. Save for these costs, it follows that Astra is to pay Musst the costs of the consequential hearings of 17 December 2021 and 21 January 2022.

(5) The costs of the hearing of 30 and 31 August and other matters

143. In the course of submissions of Musst about costs of 13 February 2023, Musst submitted that the costs should follow the event, and that there should be a substantial payment on account of costs. Astra submitted that this should be considered when the Court had this judgment in its final form: see Astra's submissions as to costs of 15 February 2023 at paras. 2-4. That is an appropriate request. If costs are not agreed, the parties are expected to provide in early course further short submissions as to costs first by Musst and in response by Astra. The Court expects that any further submissions about costs will be no more than 4 pages each exclusive of any costs schedule.

X Security for costs

144. There now stands to be considered the position as regards security for costs. There is agreement that Musst should provide security for costs. The disagreement is about

first the form and timing of security, and second the costs of the argument as regards security. As to the first, the parties have agreed that the first tranche of security should be £180,000. In its skeleton argument dated 25 August 2022 for the 30/31 August 2022 hearing, Astra stated at para.77 that the argument of Musst that its money in court in the first action could be used as security in the second action was hopeless because the money in the first action in the event of its appeals being allowed would be required in respect of an adverse costs order against Musst in the first action. Astra contended that since the appeal might be resolved against Musst, there should be fresh security provided.

145. Musst's position, as set out in paragraph 65 of its skeleton for the 30/31 August 2022 hearing, was that pending the Court of Appeal's judgment in the first action, there should be no further security in that (a) if the appeal is resolved in favour of Musst, £180,000 of the money in court could be utilised for the second action, (b) if the appeal is resolved against Musst, that might affect the viability of the second claim. In Musst's skeleton argument dated 25 August 2022, the argument was that the second claim should be stayed pending the appeal, as should any order about security for costs.
146. The appeal has now been decided against Astra, and so Musst says in these circumstances that the argument of Astra against using the first security must go. The argument now put by Astra is that new security should be provided even after its appeal was unsuccessful in that there could be no knowledge whether the money in court in the first action would be good security: there might be prior claims against it by funders or solicitors present and past or from Matrix Receivables Limited ("Matrix"). Matrix had issued a claim against Musst in 2020 claiming 80% of the sums received from Astra or a quantum meruit. This argument is run despite the receipt by Musst of an interim payment of in excess of US\$3.8 million and an order for the payment of the costs of the contract and defamation actions made on 18 March 2022. Even if the Matrix argument were to prevail, Musst would still be entitled to 20% of the interim payment, a sum of in excess of US\$750,000 and the return of the moneys standing as security in the first action.
147. Questions were raised by Payne Hicks Beach on behalf of Astra in an email of 10 February 2023 as to what claims there might be to the moneys in court from the first claim. In response, Taylor Wessing on behalf of Musst replied that "*we are instructed that our client has the appropriate rights over the £180,000 that has been proposed as the first tranche of security in this matter.*"
148. Based on the foregoing, it is in my judgment speculative that Musst is not able to utilise the £180,000 presently in court in respect of the first action for the purpose of the second action. I reject the submission that Musst has not given sufficient reassurance that there are no prior claims to these sums. It is understood that prior to the decision of the Court of Appeal in the first action, the security in the first action would not have been satisfactory, but the effect of the success of Musst in the Court of Appeal has as the effect that (a) there is no call against the moneys in court in favour of Astra in respect of the first action, (b) there are large costs orders payable in favour of Musst in respect of the first action, and (c) even if Matrix have a good claim for 80% which remains to be seen, 20% of the interim payment of in excess of US\$3.8 million stands to be paid out to Musst.

149. It therefore follows that the security in court should be treated as adequate security. The remaining question is whether an order for costs of the debate about security for costs should be ordered. Astra says that the parties should see the determination about security for costs and receive submissions before deciding the costs of the security obligation. There have been limited costs orders thus far. The costs do not appear to be very substantial, but I shall defer argument in respect of the costs of arguing about security for costs until the parties have seen this draft judgment.

XI Astra's submission about moneys falling due after judgment

150. At the end of the written submissions of Astra, it is stated (paras. 86-88) that any application for further relief in respect of moneys falling due after judgment should be made by a fresh action. There was not a formal application about this, and it was not dealt with at the hearing of 30/31 August 2022. Astra has notified the Court that this is pursued, and at the court's direction, there were short further submissions in this regard of Musst dated 13 February 2023 and of Astra dated 15 February 2023.
151. The concluding paragraphs of the skeleton argument of Astra dated 25 August 2022 read as follows:

86. "Finally, the 18.03.22 Order at ¶17 {11} gave Astra liberty to argue at this hearing that any application for further relief in respect of moneys subsequently falling due from time to time as a result of this Judgment should have to be made by a fresh action.

87. Astra invites the court to make an order to this effect. Given that no application has been brought, under ¶16 of the same order so as to challenge the adequacy of Astra's disclosures or the payment that it has made into court, Musst can no longer suggest that the court needs to have continued oversight of the parties' ongoing contractual relationship. Any future failings will have to be brought back to court in the usual way.

87. For the same reason, the court is invited to draw a line under the permission given by ¶16 of the order and direct that, given the amount of time that has gone by and the fact that Musst has not made any application, the interim payment it directed in the Consequentials Judgment should be made final."

152. The relevant parts of the order dated 18 March 2022 read as follows:

"15. The following outstanding issues in the Contract Claim shall be considered at the forthcoming hearing in the Crown II / III Claim (to be listed pursuant to paragraph 19 below):

- a. *The costs of the consequential hearings, referred to at paragraphs 3 and 7 above.*
- b. *The Claimant's right to inspect the Defendants' books and records in relation to the Crown II and Crown III accounts.*

16. *The parties in the Contract Claim have liberty to apply on written notice with directions in respect of the same, not to be made unless the proposed applicant has exercised reasonable endeavours to agree the same with the proposed respondent(s) in relation to*

a. the adequacy of the Defendants' responses dated 14 February 2022 to the Claimant's request for further information dated 31 January 2022; and

b. Payments currently falling due by the Defendants to the Claimant as at the date of the Judgment

17. *The foregoing is without prejudice to the Claimant's ability to apply for further relief in respect of moneys subsequently falling due from time to time as a result of this Judgment. Until further order, this may be by an application in these proceedings. However, the Defendants shall be at liberty to argue on the determination of the outstanding issues referred to in paragraph 15 above that any such application from that time onwards should be by a fresh action."*

153. The above quoted points at paras. 86-88 of the skeleton of Astra were not addressed by Musst at the hearing. Musst has now considered the point and has stated in its submission dated 13 February 2023 that if there is any claim for breach of contract by reason of failure to pay any monies due to it arising after the 17 December 2021 judgment should be made by way of a fresh claim. This is qualified on the basis that the claim is not an abuse of process of the court or that it should not have been made in the current proceedings. Astra says that there should be a simple order made to the effect that any claim for breach of contract for monies arising after the 17 December 2021 judgment should be by a fresh claim, and it will have to be judged at the time whether it is an abuse of process or otherwise: see the submissions of Astra dated 15 February 2022 at para. 3.
154. I intend to make no order in respect of the above. It is noted that it is the intention of Musst to make any such application by way of further action. I am not making any prescriptive order about this in circumstances where there is the possibility that any further action will be met by a response that the claim ought to have been brought in the first action. That opens up the possibility of a response that there is a bar to a fresh action and to a possibility that the relief can still be obtained within the first

action. Having judged the matters set out in this judgment in respect of matters covered by the portmanteau term *res judicata*, Musst is entitled to couch with caution and conditions any agreement to the application having to be by way of a further action. The danger of making an order that Musst be limited to a further action is that an order intended to provide greater procedural clarity might lead to further procedural arguments. There is no reason to make an order against Musst in these circumstances to confine it to a fresh action.

155. In respect of the attempt to draw a line in para. 88 of the skeleton of Astra quoted above, I am not prepared to make an order to that effect at this stage. There will not be a final judgment in terms of the interim payment which has been made. This point was not the subject of argument at the hearing in August 2022 and was not raised thereafter prior to the recent provision in draft of the judgment. Musst is seeking to verify the figures which Astra has so far provided for the sums received up to 21 December 2021.
156. There may come a time when a line is to be drawn, but I am satisfied that that time has not yet arisen: see para. 4 of the submissions of Musst dated 13 February 2023 “pursuant to direction of 9.2.23.” I reject the submission made in that Astra’s submission of 15 February 2023 (para. 8) that it is now too late to seek assistance in respect of documents (including enlisting an expert) or that these are matters which should have been concluded. I am not making any adjudication in respect of what further orders, if any, are required. The parties are expected to cooperate in respect of the future provision of information.

XII Final word

157. This is intended to conclude the issues currently before the Court at this stage. In the meantime, the time for any application for permission to appeal is adjourned until after all matters are resolved (and that the time for appellants’ notices is deferred accordingly). Whilst that is the order for now, the Court expects to deal with permission in early course if an application is to be made. At the same time as the submission referred to in the second sentence of this paragraph, there should be definition of how and when it is proposed that the Court should deal with any application for permission.
158. There also needs to be considered when any application to amend the Particulars of Claim may take place if it is pursued. It was referred to at para. 51(2) of the skeleton argument of Musst dated 25 August 2022. It is possible that this will no longer be required or that any application may not be in the same form since the decision of the Court of Appeal. These are matters that need to be addressed as part of a consequential order.
159. I am grateful to all Counsel and solicitors for their continued assistance in this matter and for the detailed attention and assistance contained in their submissions.